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THE UNIVERSITY OF ALBERTA

THE GENERAL PRINCIPLES OF THE LAW OF EXTRADITION - WITH REFERENCE TO THE RECENT TREATIES CONCLUDED BETWEEN STATES

by

SURYA KIRAN GURUNG ©

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF
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Linda Reif
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....

Dated.....[illegible]....... 1989.

Dedication

Dedicated To my parents.

ABSTRACT

It has been almost more than two centuries since extradition developed into a well-ordered legal process. States however, have not yet developed a uniform international practice to deal with the problem. In the absence of universally accepted principles of international criminal law, it has become imperative that States agree to a set of principles on the law of extradition. Authorities on this subject on the other hand believe that it is difficult to deal with the problem in absence of internationally recognized principles and an international criminal court. The view of the authorities denote utmost urgency for the need of an internationally accepted legal order to cope up with the problem.

On the other hand, the lack of agrement as to the term "political offence", has made this concept one of the most controversial issues in the law of extradition. The surge in terrorist activities and new methods applied by them since the past few decades have brought this issue in the lime light once again. In the absence of unanimity on the concept of terrorism, States are being prompted to conclude stringent extradition treaties limiting the concept of political offence. However, like most treaties they are limited to the State parties to it.

In the following chapters an attempt is made to describe briefly the general principles of the law of extradition and the practices followed by some States in this area of the law. Reference has also been made to the "emerging trends" in view of recent extradition treaties concluded between certain States.

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ABBREVIATIONS

A.C.	Appeal Cases: British House of Lords And Judicial Committee of the Privy Council.
All.E.R.	All England Reports.
Am.J.Int'l.L.	American Journal of International Law.
A.S.I.L.S.Int'l.L.J.	American Society of International Law Students' International Law Journal.
B.Ybk.I.L.	British Yearbook of International Law.
C.C.C.	Canadian Criminal Cases.
C.L.P.	Current Legal Problems.
C.L.R.	Criminal Law Reports.
C.T.S.	Canadian Treaty Series.
C.T.S.	Parry's Consolidated Treaty Series.
C.Ybk.I.L.	Canadian Yearbook of International Law.
D.L.R.(3d.)	Dominion Law Reports (third series).
E.H.R.R.	European Human Rights Reports.
F.	Federal Reporter (United States).
F.2d.	Federal Reporter (second series United States).
F.Supp.	Federal Reporter Supplement (United States).

I.L.M.	International Legal Materials.
I.L.R.	International Law Reports.
Ind.Ybk.Int'l.Aff.	Indian Yearbook of International Affairs.
Is.L.R.	Israel Law Review.
Is.Ybk.H.R.	Israel Yearbook of Human Rights.
Johns. Ch.	John's Chancery Reports (United States).
K.B.	Law Reports, King's Bench Division.
L.J.M.C.	Law Journal Reports, New Series.
L.N.T.S.	League of Nations Treaty Series.
N.R.	National Reporter.
N.Y. Rep.	New York Reports.
N.Ybk.Int'l.L.	Netherlands Yearbook of International Law.
O.R.	Ontario Reports (Canada).
Q.B.	Law Reports, Queen's Bench Division.
S&R	Sergeant and Rawle Law Reports.
S.C.R.	Supreme Court Reports (Canada).
Stat.	United States Statutes at Large.
T.I.A.S.	Treaties and Other International Act Series (United States).
U.N.T.S.	United Nations Treaty Series.
U.N.Ybk.	Yearbook of the United Nations.
U.S.	United States Reports.
U.S.C.	United States Code.

U.S.T.	United States Treaties and Other International Agreements.
Va.L.R.	Vanderbilt Law Review.
W.L.R.	Weekly Law Reports (United Kingdom).

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CHAPTER I

1. HISTORICAL BACKGROUND

The concept of ' extradition' is not new; the origin of international cooperation in the suppression of crimes goes back to the very beginnings of formal diplomacy.[1] The practice of extradition has remained a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused criminal or a fugitive offender.[2] The surrender of fugitives in early times was confined to political offenses,[3] the primary interest of the state being the preservation of its political system.[4] And extradition was resorted to in the case of " conspirators or instigators of war or rebellion."[5] Thus, " the Caeritians delivered (351 B.C.) to Rome the Tarquinians, as the instigators of their revolt."[6] And, " in 329 B.C. the Fundanians surrendered to Rome three hundred and fifty conspirators."[7] " In 205 B.C. Mandonius and other Spanish Chiefs were given up to Rome for having fomented the war."[8] Similarly, in " 193 B.C. the Aetolians surrendered to the Romans certain of their number for having instigated the inhabitants of Naupactum to defection."[9] Phillipson states that;[10]

> " Extradition was always demanded for offences against the Majesty of a state, such as instigating insurrection, or against individuals performing public functions."

In the case of private crimes, vengeance was the principle of the primitive criminal law and murderers were put to death by the dead man's next of kin.[11] As one author states;

> " Revenge was the sentence imposed on the criminal, whether pronounced by the priest on behalf of the offended deity or by the head of the family or tribe in judgement for injury done to one of its members. The avenger pursued the condemned slayer and, if successful killed him summarily. The law thus provided the expiatory fulfilment of punishment and the righteous justification of individual retaliation."[12]

On the other hand, ' the right of asylum occupied a prominent place in the religions, in the political and in the legal history of antiquity. It was a universal recognition, spontaneously and unconsciously arrived at, of the necessity to alleviate the rigour of law, and of the obligation to extend mercy, under certain conditions, to those in distress, and more particularly to suppliant fugitives.'[13] In antiquity, " certain cities were designated as places of refuge in which the homicide may take sanctuary. These cities served as places of refuge from the vengeance of the dead man's next of kin."[14]

The right of asylum existed amongst the ancient Egyptians,[15] and Israelites were the first people to develop the institution systematically.[16] In Greece also, ' suppliants were considered to enjoy inviolability and to be under the direct protection of Zeus. Refuge was found in the Greek temples. Polybius mentions for example, the temple of Artemis, situated between Cleitor and Cynaetha, which was regarded by the Greeks as offering an inviolable refuge.'[17]

In antiquity, asylum was taken in sacred places, as such places were considered to be inviolable by the pursuer. The general belief being that sacred places were resided in by god and violation of such place meant that the wrath of the god would fall upon the violator.[18] Apart from the sacred sanction, positive law dealt severely with those who were found guilty of this sacrilege - ' which included violation of asylum as temple robbery. Sometimes the capital penalty was awarded, entailing burial outside Attic territory, and confiscation of the property of the condemned; sometimes the sentence was banishment, in addition to an imprecation, as, for example, in the case of the murderers of Cylon and his companions, who were torn away from the altar in the Acropolis.'[19]

The practice of extradition is believed to have originated in earlier non-western civilizations such as the Egyptian, Chinese, Chaldean and Assyro-Babylonian civilizations.[20] Most writers on the history of international law regard international cooperation in the matter of ordinary crime as minimal before the eighteenth century; very few treaties existed, and such extradition as did take place occurred generally in the absence of treaty obligations,[21] on the ground that the sovereign could expel any alien. However, it may be argued that the early writers maintained that there existed in natural (customary) law the duty to try or return the criminal to the place where the offence was committed. For example, Hugo Grotius was of the opinion, that;[22]

> " 1. Anyone who cannot be charged with a like crime has a natural right to exact punishment. But, since the organization of states, it is agreed that the crimes of individuals, in so far as they properly concern the community to which they belong, should be left to the states themselves and their rulers, to be punished or condoned at their discretion.
>
> 2. But so comprehensive a right has not been granted to states and their rulers in the case of crimes which in some way affect human society, and which it is the right of other states and their rulers to follow up, just as in each state it is possible for any citizen to initiate a prosecution for certain offenses. Much less do states and their rulers possess this full authority in the case of crimes by which another state or its ruler is in a special sense injured, and on account of which that ruler or state, for the sake of dignity or security, has the right to exact punishment ... Therefore the state in which the guilty person dwells, or its ruler, ought not interfere with this right."

Grotius further adds that;[23]

> " Since as a matter of fact states are not accustomed to permit other states to cross their borders with an armed force for the purpose of exacting punishment, and since such a course is inexpedient, it follows that the state in which he who has been found guilty dwells ought to do one of two things. When appealed to it should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal."

Similarly, Vattel in his work, The Law of Nations, lays down a similar principle, i.e., either to punish the fugitive criminal or deliver him up to the injured state. He states that,[24]

> " Since the sovereign should not permit his subjects to trouble or injure the subject of another state, much less to be so bold as to offend a foreign power, he should force the offender to repair the

> evil, if that can be done, or punish him as an example to others, or finally, according to the nature and circumstances of the case deliver him up to the injured state,so that it may inflict due punishment upon him. This is the practice generally observed with respect to serious crimes which violate the laws and menace the safety of all nations alike ...."

He further adds that;[25]

> " ... In states which are on more intimate terms of friendship and comity, the matter is carried further still; even in the case of ordinary misdemeanours which are subject to civil prosecution, and for which damages may be exacted or a light civil punishment inflicted, the subjects of two neighbouring states are mutually obliged to appear before the magistrate of the district in which they are accused of having done the wrong. Upon the requisition of that magistrate by a rogatory letter, they are summoned by their own magistrate and forced to appear before the other ...."

The views of Grotius and Vattel reflect the idea that, even though no treaty as such existed at that period for the extradition of offenders, extradition was thought of as an obligation of a state. One author[26] is of the view that though, ' publicists do not share a common view as to the origin of extradition, they are of the opinion, that, like any other human institution, extradition is a product of gradual growth, hence it is impossible to fix a definite date as to when it began.'

Extradition in the sixteenth and seventeenth centuries had manifested itself in the preservation of the political and the religious interests of states,[27] and a distinction was hardly made between public and private law.[28]

The first recorded extradition treaty was concluded between Ramses II, Pharaoh of Egypt and the Hittites in 1280 B.C., and is regarded as the second oldest document in diplomatic history.[29] It was provided by this treaty that;[30]

> " Each sovereign bound himself, in the first place, not to receive emigrants from the country of the other, and to send back fugitives, and in the second place, to treat with clemency such as were thus extradited."

Early treaty practices indicate that it was for political offenses that the surrender was claimed. As such, the earliest treaty concluded in this respect was between Henry II, King of England, and King William of Scotland in 1174, the purpose of which was the mutual surrender of " traitors".[31] And the Treaty of Paris concluded in May 1303 between England and France provided that neither sovereign should grant protection to the enemies of the other.[32]

During the sixteenth century, the Counter-Reformation and the bloody religious persecutions throughout Europe had made religious asylum a social need. And the problem of extradition and asylum was approached for the first time from the perspective of international cooperation in the suppression of criminality.[33] This idea had been first advanced by Jean Bodin in his work " Les Six Livres de la Republique", when he stated that;[34]

> " If they will confesse euery Prince by the lawes both of God and nature to be bound to doe iustice; they must also confesse that he is bound to restore another man subiect unto his own natural prince demanding him; not onley for the more manifest trying out of the truth, and discouering of the

> conspirators their partakers, for which their personnal preference and confrontation is most necessaire; but also for exemplarie punishment to be done, in the same places where the offences were committed;"

This idea of Bodin, was further elaborated by Grotius[35] and the school of natural law.

The criminalists exerted a powerful influence upon the development of extradition in the eighteenth century. Beccaria, their chief exponent, in his work " Deslits et des peines,"[36] emphasized the necessity of extradition as the only effective means of dealing with fugitives from justice;

> " there can be no more effective way of preventing crimes than to convince the criminal that no country is open to him where he may remain unpunished."[37]

The traditional concept of extradition underwent a change in the nineteenth century with the industrialization of society as it opened up a much wider field for the ingenious criminal.[38] To protect the lifeline of commercial enterprises, it was essential that there should also be included among the extraditable crimes those acts which were directed against the commercial installations of the contracting parties.[39] Moreover, with the extension of international relations, nations have been aroused to a common feeling of solidarity of interest in the repression of crimes.[40]

On the other hand, the principle of non-extradition of political offenders[41] is of recent origin. The principle of non- extradition for political offenses was unknown prior to the French Revolution.[42] In fact, as observed earlier from antiquity to the late eighteenth century persons were sought because of political reasons.

Most states refuse to extradite political offenders. This principle is usually codified in the form of the " political offence exception," although agreement is lacking on definition of such offenses. This clause in extradition laws and treaties provides that extradition shall not be granted for political crimes.[43] However, the increase in acts of international terrorism has made this concept vulnerable, and further observation of this problem has been made in Chapter IV of this Thesis.

State - practice on some matters of extradition differ from country to country, which gives us an idea of the law of extradition as understood in the past and at present.

i. ENGLAND; " 1174 - PRESENT"

England is said to have been slower than other states in making provisions for extradition.[44] However, in 1174 a treaty was signed between Henry II and King William of Scotland.[45] And in 1303, England concluded a treaty with France.[46] England signed treaties with Denmark and Holland in 1661[47] and 1662[48] respectively. Between 1174 and 1794 only five treaties are listed to have been concluded by England and were concerned with the delivery of political offenders.[49] However, the treaty of 1794 concluded between England and the United States contained the following provisions in Art. 27;[50]

> " ... will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum ... provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person shall be found ...."

The beginning of general extradition treaties between England and Continental European states dates from the Treaty of Amiens in 1802,[51] and contained provision for mutual extradition with the Netherlands, France, and Spain.[52] The provision for mutual extradition reappeared in the treaties of 1814 and 1815 with France, but in so far it applied between the British and French Indian possessions. This was intended to ensure their trial by European rather than native tribunals.[53]

The effective beginning of treaty-making by England in the law of extradition in the nineteenth century is marked by the Webster-Ashburton Treaty of 1842.[54] This treaty although similar to the treaty of 1794, extended the list of extraditable offenses. Art.9. of the treaty of 1842 provided that the parties,[55]

> " ... will deliver up to justice, all persons who being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery or forgery, or the utterance of forged papers,"

whereas, Art 27. of the treaty of 1794 listed only murder and forgery as extraditable.[56] In 1843 a similar treaty was signed between England and France.[57]

However, the period from 1794 to 1870 was stagnant as far as the law of extradition in England is concerned, and ' the conclusion of extradition treaties by England was meagre until 1870.'[58] Moreover the term ' extradition' though used occasionally from 1839 achieved recognition as a legislative usage only through the passing of the Extradition Act of 1870.[59]

The most significant proposed agreement of this period was that of 1852 negotiated with France. However it ' never entered into force owing to the failure of the British Parliament to pass the requisite legislation.'[60] The proposed agreement had extended the list of extraditable crimes and Art. VII provided for the exception to political offenses:[61]

> " No accused or convicted person who may be surrendered shall, in any case, be proceeded against or punished on account of any political offense committed prior to his being surrendered, nor for any crime or offense not described in the present convention, which he may have committed previously to his being surrendered; and proof of having been so surrendered under this convention shall be a good and valid defence against any proceeding on account of any political offense previously committed and shall entitle the party to an immediate acquittal."

The provision of Art. VII is significant in making the political offense an exception to extradition. However, according to the above mentioned provision, an accused could be tried for an offense other than that for which extradition had been granted provided such offense was listed as a crime in the treaty.[62]

Distinct from the practice of some states,[63] where extradition is granted in absence of a treaty, England has refrained from such a practice. The English practice was made clear in the case of The Creole[64] as early as 1841 in which the opinion of the law officers was pronounced as follows;

> " It is the practice of some states to deliver up persons charged with crimes who have taken refuge, or been found within their dominions on demand of the government of which the alleged criminals are subjects but such practice does not universally, or even generally prevail, nor is there any rule of the law of nations rendering it imperative on an independent state to give up persons residing or taking refuge within its territory. The mutual surrender of criminals is indeed sometimes stipulated by treaty, but there is not at present any subsisting treaty to that effect with the United States of America, we think that Her Majesty's Government is not bound on demand of the Government of the United States to deliver up the person in question, or any of them, to that Government to be tried within the United States."

This practice was confirmed as recently as 1963 in R v. Governor of Brixton Prison, ex Parte Soblen,[65] as Lord Denning M.R., in this case said;

> " It is unlawful, therefore, for the crown to surrender a fugitive criminal to a foreign country unless it is warranted by an extradition treaty with that country."

Similarly, as opposed to the practice of some states e.g., France,[66] Germany,[67] Israel,[68] which deny the extradition of nationals, the practice of excluding one's own nationals has never been favoured by England. And the first treaty of this kind was concluded with the United States in 1794 which applied to all persons irrespective of their nationality,[69] and, ' the British Government has consistently denied the right of other states to extradite British subjects to third states in the absence of a treaty even as a matter of grace.'[70] The extent to which the British Government adhered to the practice of extraditing its own nationals may be seen from the treaty concluded with Switzerland in 1880.[71] But the treaty between England and Mexico for the Mutual Surrender of Fugitive Criminals, (1886),[72] contained the following discretionary clause in Art. III; " Either Government may, in its absolute discretion refuse to deliver up its own subjects to the other party," implying that surrender of nationals was possible. This clause was inserted to satisfy the Mexican practice which refused to extradite its nationals. However, the Supplementary Treaty with Belgium concluded in 1887 states in Art.II[73];

> " In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization."

This particular provision received wide interpretation in Re Galwey, in 1896,[74] when the, ' surrender of Galwey a British subject was demanded by the Belgian Government in respect of certain extradition offenses. ' Lord Russell C.J., referring to the said provision of the treaty with Belgium, said;

> " ... what does that mean ? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

It was held, " that the accused, although a British subject was a person ' liable to be surrendered' within the meaning of sec.6 of the Extradition Act, 1870 ...." The court in this case interpreted the term ' bound' in reference to the executive discretion i.e., the person sought after, though, a national of the requested state may be liable to be surrendered, however, the discretion lay with the executive whether to surrender such person or not. The interpretation of the term liable was made with reference to the Extradition Act, 1870, whereby a person in accordance with the provisions of the Act could be charged.

The British treaties with the United States, (1972),[75] and Israel, (1960),[76] contain no provision relating to nationality. The Extradition Treaty of 1960 with Israel contains the following provision in Art. 1;

> " The contracting Parties agree to extradite to each other, in circumstances stated in the present Agreement, those persons who, being accused or convicted of any of the offenses ... and committed within the territory of the one party, or on the high seas on board a vessel registered in the territory of that Party, shall be found within the territory of the other Party."

However, this treaty with Israel was concluded when the Israeli Extradition Law of 1954 permitted the extradition of Israeli nationals. But, ' Bill No. 1306 of 25 July 1977 of Israel, amends the Extradition Law of 1954 so as to preclude entirely the possibility of extraditing to foreign states any nationals of Israel.'[77]

The passing of the English Extradition Act, 1870[78] heralded an intensive period of treaty making by England. The Extradition Act, in sec. 3(i), provided;

> " A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of political character."

The Act gives no definition whatsoever of the term ' offence of a political character'. The only meaning to the concept was offered by J.S. Mill in the drafting period, when speaking in the House of Commons debate. He advanced the view " that a ' political offence' was one committed in the course of or furthering civil war, insurrection or political commotion."[79] And Justice Stephen in his work History of the Criminal Law of England,[80] expresses the view that, a political offence was one committed incidentally to and as part of political disturbances. It is in accordance with the wording used in the latter view that the test applied by the English courts in determining the political nature of an act became known as the incidence test.[81] The concept was further enunciated by the English courts in Re Castioni[82] and has become generally accepted in the Commonwealth countries and the United States.

However, the Extradition Act of 1870 has been amended and at present extradition procedure in the United Kingdom is regulated by the Criminal Justice Act of 1988. Recent practice adopted by England with respect to United States on the concept of what constitutes a political offence is different from what was enunciated in Castioni. A detailed study of this concept has been discussed in Chapter IV.[83]

ii. FRANCE ; " 1791 - Present"

France has played an important role in building up the rules of extradition law as we find it today. ' The word extradition itself was imported into English from French.'[84] It was first used in a decrét dated 19 February 1791 although the word did not appear in a treaty to which France was a party until 1828.[85] And as mentioned earlier, France was a party to the most significant proposed treaty of 1852 with England,[86] ' which for the first time in extradition law, made provisions for the exemption of political offenders, the non-extradition of nationals, rules of speciality[87] and the resolution of conflicting requisition.[88] The treaty also contained more elaborate procedural provisions than previously, embraced convicted as well as accused criminals, and extended greatly the number of extraditable offenses.'[89] But this particular proposed treaty never entered into force.

Although the practice of non-extradition of political offenders was initiated by France, she concluded a treaty in 1798 with Switzerland, renewed in 1803 by Napoleon, which contained provisions relating to the extradition of political offenders,[90] Art. 14 of the treaty provided that;

> " The two Republics enter into a mutual agreement not to grant asylum to emigrants or to the deported from each country. They likewise bind themselves to extradite reciprocally at the first requisition the nationals of each country who shall be decreed by the court guilty of conspiracy against the internal and external security of the state, assassination, poisoning, arson, falsification of public documents, and robbery with violence, or who shall be prosecuted as such by virtue of an indictment."

The exception of political offenders as an express limitation on extradition first appeared in international practice in the treaty between France and Belgium in 1834.[91] Exception for political offenders was also made in the treaty concluded between France and the United States, November 9, 1843,[92] Art. V of which provided that;[93]

> " The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second article,[94] committed anterior to the date thereof, nor to any crime or offence of a purely political character."

In France, the recognition of the principle of non-extradition of political offenders was hastened by the Galloti affair.[95]

> " Galloti was a Neapolitan officer who belonged to the faction of the Carbonari. He took part in the revolution of 1820. Sentenced to death par contumace after the restoration of the Bourbons, he fled to Corsica. The Neapolitan minister in Paris demanded his extradition on charge of theft and violence against persons and made a formal promise to the French government that he would not be tried for a political offence. The extradition was granted on that assurance; but it was withdrawn by the French government even before the arrival of Galloti at Naples upon being informed that the charges were in reality political. This counter order arrived too late; Galloti was already in the hands of the Neapolitan government which refused to release him. The event had such a repercussion in French politics that, following an interpellation in the chamber, the Martignac cabinet persisted in its demand and sent a squadron to the Neapolitan waters to enforce

> it if necessary. In view of the determined attitude of France the government of Naples only imposed on Galloti the penalty of deportation for ten years. Satisfied with the result, France let the matter drop. Finally Louis Phillipe obtained Galloti's liberty."

During the early stages France showed a liberal attitude towards political offenders, and the French Constitution of 1830 expressly recognized the principle of non - extradition of political offenders.[96] The Circular of 1841 of the Minister of Justice of France, states the ground for exempting political offenders from extradition. " Political Crimes", says the Circular;[97]

> " are committed under circumstances of which it is so difficult to take account; they spring from passions so inflamed, which often form their excuse, that France maintains the principle that extradition ought not to take place for a political act. This is a rule which she considers is a point of honour to uphold. She has always refused since 1830 such extradition. She will never ask it."

Thus the concept of political offense as understood from the Circular of 1841 clearly embraces the idea of ' relative political offense'.[98] However, ' the year 1856 saw the first limitation upon the concept of political asylum. Until 1856 treaties were framed to exempt only those offenses connected with acts of a political character. This act of limitation was the consequence of an attempt against the life of Emperor Napoleon III. Two Frenchmen suspected of a plot to kill the Emperor fled to Belgium and extradition was demanded by the French government. The accused contended that the crime for which extradition was requested, apart from not being covered by the convention between France and Belgium, was of a political character. The Chambre des mises en accusation held that the offence with which the accused were charged was political or at least connected with a political offence, so that, the detention of the accused was illegal. Upon appeal the judgement was reversed by the court of cassation on March 12, 1855, on the ground that the act was not of an exclusively political character. Pursuant to the Belgian law, the opinion of the former court was requested by the government. This body advised the government that the accused ought not to be extradited. Public opinion at that time was favourable to the accused. To save the Belgian government from further embarrassment, the French government withdrew its demand.'[99] This case prompted the Belgian government to pass a bill on March 14, 1856, amending Art.6 of the law of October 1, 1833. And the article as amended provided that,[100]

> " An attempt against the life of the head of a foreign government or against that of any member of his family when that attempt constitutes the act either of murder or assassination, or of poisoning shall not be considered a political offence or an act connected with such offence."

This provision known as the " Belgian Attentat Clause" was incorporated in the Franco - Belgian Convention of September 22, 1856.[101]

French practice in the early nineteenth century shows considerable liberality to acts ' connected with political offenses.'[102] The practice adopted by the French courts became known as the ' objective test'.[103] However, the French attitude towards the concept of political offense has not been uniform and shows a considerable change from the earlier practice as will be observed from the decisions of the French courts discussed later on.[104]

Apart from the concept of political offense discussed so far France does not allow the extradition of her own nationals. This is expressly provided by the French Law of March 10, 1927, in Art.3;[105] " The French Government may deliver to foreign Governments, at their request, every person not French or French ressortissant ...."

This provision has been maintained in the French Code of Criminal Procedure, (1975),[106] however, with a modification that, such offender(s) may be prosecuted and judged by the French courts.

The practice of France as opposed to the practice of the common law countries,[107] demonstrates the willingness to grant extradition in the absence of a treaty. The circulaire of a French Minister of Justice of July 30, 1872, provided that " on the basis of reciprocity, extradition might take place in the absence of a treaty."[108] And, a French judicial decision as early as 1827 approved extradition in the absence of treaties:[109]

> " the right to deliver up a foreigner, accused of a crime or a misdemeanour in his country of origin, to the tribunals of that country, does not take its point of origin in treaties concluded with foreign powers, but in the rights which the King derives

> from his birth and by virtue of which he maintains relations of comity with neighbouring States."

The practice of extradition in the absence of a treaty has been maintained by the French Law of March 10, 1927, which provides in Art.1 that;[110]

> " In the absence of a treaty, the conditions, the procedure and the effects of extradition are determined by the provisions of the present law.
>
> The present law applies as well to matters which are not regulated by treaties."

iii. UNITED STATES; " 1791 - PRESENT"

The first two American treaties making provision for extradition were concluded with England in 1794[111] and 1842.[112] A third treaty was concluded with France in 1843.[113] The provisions of the above mentioned treaties have already been discussed earlier. ' American treaty making in the field of extradition between 1842 and 1870, moved more rapidly than the British. For example, by the end of 1869 the United States had concluded extradition treaties with seventeen countries, in comparison to England which had extradition treaties with only three countries at the same time.'[114]

However, the practice of the United States Government during the eighteenth century indicates that the practice of extradition was not uniform. For example in 1791 ' when the Government of Pennsylvania made demand to the Governor of Virginia for the surrender of a fugitive from justice, doubts were raised as to the person to whom the demand should be addressed and the mode in which it should be made, the reason being, that there was no statute to this effect.'[115] In order to remove the doubts the Act of Congress of 12th February 1793 was passed as follows;[116]

> " On demand, accompanied with a copy of indictment found or affidavit made before a magistrate, charging the person with having committed ' treason, felony or other crime,' and certified by the Governor or Chief magistrate of the demanding State to be authentic, it should be the duty of the executive magistrate of the State to which the person had fled to cause him to be arrested and secured, and notice thereof given, and the person to be delivered to the agent of the executive making the demand, if such agent should appear within six months. If no such agent appeared, the prisoner should be discharged."

However, in accordance with this provision ' if a governor refused to issue a warrant for the arrest of the fugitive, there was no power conferred upon the judicial or any other department of the general government to compel him to do so. The Supreme Court could not issue a mandamus for this purpose.'[117]

Practice of the United States in the eighteenth century indicates States passing legislation authorizing the Governor in his discretion to deliver up, on due requisition, persons charged with certain crimes. Such an act was passed by the State of New York on April 5, 1822.[118] This

> " authorized the governor in his discretion to deliver up, on due requisition, persons charged with murder, forgery, larceny, or other crime which, if committed in the State of New York, would there be punishable with death or imprisonment in the State prison."

Similarly, in or about the year 1837 ' the Department of State sanctioned a demand from the Governor of Michigan on Texas for the delivery of a fugitive, and in 1840 a demand of the Governor of Georgia on Texas for the same purpose, there being no extradition treaty on which the Federal Government could act.'[119]

It was not until the beginning of the nineteenth century that the power of the various states of the United States to surrender fugitive criminals to foreign Governments was put under the control of the Federal Government and the Act of 1822 was held to be unconstitutional in People v. Curtis, (1872).[120] This was reaffirmed by the Supreme Court of the United States in 1936, in Valentine, Police Commissioner of New York City, et al v. United States ex rel.B. Coles Neidecker,[121] when the court said; " It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the States."

The United States, like England does not recognize the right to extradition apart from treaty. However, the United States in the early nineteenth century, did accept the practice of extraditing in the absence of a treaty, as may be observed in the case of Daniel Washburn, (1819),[122] in which Chancellor Kent held that;

> " ... irrespective of all treaties, it is the duty of a State to surrender fugitive criminals ...; and with reference to the argument that even if the duty of extradition existed, it must be held to be limited to the cases of murder and forgery, which had been included in the treaty of 1794, ... that

> treaty was merely declaratory, and that, even if during its existence the principle ' enumeratio unius est exclusio alterius' applied, at its expiration the general and wider law revived."

The two leading doctrines in Chancellor Kent's judgement were, that ' the duty of extradition existed independently of any treaties; and that, being a part of international law, it was ipso facto a rule of municipal law, and one which judges were bound to administer.'[123] However, the judgement of Justice Tilghman in Edward Short v. Deacon, (1823),[124] denied the doctrines stated by Chancellor Kent. The later practice as to extradition expressed by Justice Tilghman, is as follows;[125]

> " No State has an absolute and perfect right to demand of another the delivery of a fugitive criminal, though it has what is called an imperfect right, that is, the right to ask it, as a matter of courtesy, good will and mutual convenience. But a refusal to grant such request is no just cause of war."

The decision of Justice Tilghman in Edward Short v. Deacon, was confirmed in the case of Greene, et al v. United States, (1907), when the court said[126] " The modern view and the one maintained in this country, is that a State is under no obligation to surrender ... unless it has contracted to do so."

Thus, the present practice of the United States is that " the requests for extradition may be granted only pursuant to a treaty of extradition."[127]

Current practice followed by the United States may also be observed from the following sections of the American Law

Institute's Restatement of the Law, (1987).[128] Section 475 of the Restatement states the basic rule of extradition between states which is as follows;

> " A State party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state
>
> (a) for trial on charge of having committed a crime covered by the treaty within the jurisdiction of the requesting state, or
>
> (b) for punishment after conviction of such a crime and flight from that state,
>
> provided that none of the grounds for refusal to extradite set forth in Sec. 476 is applicable."

The provision of Sec. 475 is only applicable in absence of the application of Sec. 476. However, the use of the term ' is obligated to comply' in Sec. 475 seems to be too extensive as the only obligation of a state party to an extradition treaty is to examine the request and deliver the person(s) affected, if the forms of the treaty are satisfied. Section 476 of the Restatement, states the ' Grounds for Refusal of Extradition' as follows;[129]

> " Under most international agreements, state laws, and state practice:
>
> (1) A person sought for prosecution or for enforcement of a sentence will not be extradited
>
> (a) without showing that there is cause for holding him for trial for the offense with which he is charged, or that he had been duly convicted of the offense;
>
> (b) if prosecution in the requesting state would be, or was, in contravention of an applicable principle of double jeopardy;

> (c) if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and in the requested state; or
>
> (d) if the applicable period of limitation has expired.
>
> (2) A person will not be extradited if the offense with which he is charged or of which he has been convicted is a political offense.
>
> (3) A state may defer extradition of a person if it is itself holding him for prosecution or punishment for a serious crime, whether or not that crime is connected with the crime for which extradition is sought."

Referring to the principles set forth in these sections, the Restatement, comments that;[130]

> " This section and section 477[131] set forth the principles contained, expressly or by implication, in a substantial majority of extradition treaties and statutes, and followed by states even in the absence of treaty or statute. Where an applicable treaty expressly provides otherwise, one or more of the conditions here set forth may not apply."

From the comments presented in the Restatement, it may be argued that the provision of 476(1)(c) and 476(2) finds no place to operate in the recent treaties concluded by the United States. For example, the Protocol Amending the Treaty on Extradition, concluded between Canada and the United States in 1988[132] contains in the amended Art.2(1) the following provisions;

> " Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment."

The views of the Restatement however good they may be do not apply with respect to the above mentioned treaty as it was drafted before the treaty came into force. Similarly, provision of section 476(1)(c) is not applicable in United States practice with respect to England[133] and Italy.[134] And, the provision of section 476(2) finds limited room to operate in view of the United States treaty concluded with Canada[135] and England[136] respectively. These treaties list certain offenses which are not considered as offenses of a political character. For example, offenses like unlawful seizure of aircraft, crimes against internationally protected persons including diplomatic agents, murder, manslaughter, taking of hostages, offenses relating to firearms or ammunition, etc. are deemed to be offenses under the ordinary criminal law of the state.[137]

As far as the concept of political offense in the context of United States practice is concerned, the first treaty negotiated by the United States with a foreign power which expressly provided for the non-extradition of political offenders was that of 1843 with France.[138] According to Art.V it was agreed that the provisions of the said convention " Shall not be applied in any manner ... to any crime or offence of a purely political character." However, the provision of this convention was limited to ' purely political offenses'. Later treaties concluded by the United States Government, however, seemed to make provision regarding

' relative political offenses', for example the Extradition Treaty between United States and Germany (1930)[139] contains the following provisions in Art.IV;

> " The provisions of the present treaty shall not import a claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses ..."

this treaty, thus makes no distinction whatsoever between ' relative' and ' pure political offenses'. Provision of this kind is found in the Extradition Treaty concluded between Israel and the United States in (1962), Art. VI(4) of which provides;[140]

> " When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character."

This provision does not distinguish between ' relative' and ' purely political offense', therefore making them both exceptions to extradition. Moreover, the United States courts have adopted the language used in Castioni.[141]

The United States courts in recent cases have applied the principles enunciated in Castioni to acts of terrorism.[142] However, the recent treaties concluded by the United States with Canada and England tend to indicate a change in practice to be followed by the United States in the near future. At present, like England, the United States seems to be adhering to a dual practice, since not all treaties concluded by the United States contain provisions similar to those incorporated in the recently concluded treaties with Canada[143] and England.[144] Thus, it seems that according to United States practice, there is to be one concept of political offense regarding Canada and England and another for other countries. Moreover, the practice of the United States with respect to recent acts of terrorism does not seem to be uniform and is dealt within Chapter IV.[145] However, it may be said that the recent treaties concluded by the United States though only with two countries at present, may be seen as a step enhancing the new trend to be set up in the law of international extradition in the near future.

The author, while discussing the practice followed by different States, did not think it imperative to deal with the early Canadian practice, taking into consideration Canada's colonial status as the Canadian statutes were based on English statutes. However, the recent practice followed by Canada has been dealt within ~~the~~ relevant sections of this thesis.

NOTES;

1.I.A. Shearer, Extradition in International Law, (1971), at p. 5.

2.M.C. Bassiouni, International Extradition And World Public Order, (1974), at p. 1.

3.Bernabe Africa, Political Offences in Extradition, (1926), at p. 6; See also, Phillipson infra n, 5 at pp. 358-75:

4.S.P. Sinha, Asylum and International Law, (1970), at pp. 170-171.

5.Coleman Phillipson, I The International Law And Custom Of Ancient Greece And Rome, (1911), at p. 360.

6.Id., at p. 360.

7.Liv. viii. 19., cited in Phillipson, Id., at p. 368.

8.Liv. xxix. 3., cited in Phillipson, Id.

9.Liv. xxxiii. 29., cited in Phillipson, Id.

10.Id., at p. 360; See also, Travers Twiss, who states that,

> " the treaties of extradition in their earliest form appear to have contained stipulations for the surrender of fugitive slaves and deserters from the military or naval services of a state."

The Law of Nations, (1861), at pp. 346-348; See also J.B. Moore, Extradition And Interstate Rendition, (1891), s s. 6 and 205, s s. 10 and 303:

11.For example, see, The Old Testament, Numbers, Ch. XXXV, v. 19 and Deuteronomy, Ch. XIX, v. 6, which refers to the recognition being given by the law for private vengeance.

12.Supra n, 4 at p. 6.

13.Supra n, 5 at p. 347.

14.Supra n, 11 , Numbers, Ch. XXXV, v. 11-15.

15.Bulmerinca referring to the authority of earlier writers such as Fulgentius, Benhardus, Sixtus Senesis and Alphonsus Tostasius, states that King Assyrophernes had erected a statute of his son, and decreed that offenders fleeing thereto should be protected; Supra n, 5 at p. 348:

16.The Old Testament indicates that Israelites allotted cities as places of sanctuary, where a homicide could take refuge and be free from harm, from the vengeance of next of kin of the dead. He could stay within the boundary of the city without any harm; however if the next of kin found him outside and killed him, the next of kin was not held guilty. But, murderers were not accorded the same treatment as the homicides, as homicides were regarded as unintentional killings. The murderers were not given sanctuary, and were put to death by the dead man's next of kin. If the murderers took sanctuary in the designated city of refuge, the elders of his own city were sent to fetch him and hand him over to the dead man's next of kin to be put to death. See, Numbers, Ch. XXXV, v. 11-32 and Deuteronomy, Ch. XIX, v. 6, 11, 12, 13.

17.Supra n, 5 at p. 349.

18.Such fears were confirmed by incidents, like, e.g.,

> " the Lacedaemonians slew a man who had sought an asylum in the temple of Poseidon at Taemarum, and,soon afterwards their city was shaken by such a prolonged and severe earthquake that not a single house in Lacedaemon withstood the shock." Pausan. viii.25.2, cited in Phillipson, Id., at p. 351.

19.Thuc.i.I 26., cited in Phillipson, Id., at p. 353.

20.Supra n, 2 at p. 1.

21.Supra n, 1 at p. 5.

22.Hugo Grotius, II De jure Belli Ac Pacis - Libri Tres, translated by Francis W. Kelsey, edited by J.B. Scott, (Reprinted 1964) Oceana Publications, at p. 526.

23.Id., at p. 527.

24.Vattel, II The Law of Nations or The Principles of Natural Law, translated by Charles G. Fenwick, edited by J.B. Scott, (1916) Oceana Publications, at pp. 136-137.

25.Id., at p. 137.

26.Africa, Supra n, 3 at pp. 5-6.

27.Supra n, 2 at p. 5.

28.See Stephen, J., IV History of the Criminal Law of England, (1883), Ch.23.

29.Langdon and Gardner, 6 Journal of Egyptian Archaeology, (1930), at p. 179.

30.See Phillipson, Supra n, 5 at p. 359.

31.P.O'Higgins, The History of Extradition in British Practice 1174-1794, in 13 Ind.Ybk.Int'l.Aff., (1964), at pp. 80-81.

32.Sir Edward Clarke, A Treatise Upon the Law of Extradition, 4th.ed. (1903), at p. 19. Similarly,

> " the treaty of 1378 made between Charles IV of France and the Duke of Savoy, provided that, all malefactors , who had fled from Savoy to Dauphiny or from Dauphiny to Savoy, should be delivered up, even if they were the subjects of the state surrendering them.
>
> And the Intercursus Magnus concluded between Henry VII and the Flemings in 1497, provided against the harbouring by one power of the rebels of another". Id.

33.C.V. Wijngaert, The Political Offence Exception to Extradition, (1980), at pp. 6-7.

34.Book III, Ch 6, (1608), in Jean Bodin, The Six Books of a Commonweale, ed. by K.D. Mc Rae, Harvard University Press, (1962), at p. 359.

35.Supra n, 22.

36.Africa, Supra n, 3 at p. 12.

37.Id.

38.I.A. Shearer, Extradition Law and Practice in the British Commonwealth, (1964), at p. 1.

39.S.D. Bedi, Extradition in International Law and Practice, (1966), at p. 17.

40.Africa, Supra n, 3 at pp. 2-3.

41.The concept of political offence defence is one of the most controversial issues in the law of international extradition, for detailed discussion, see chapter IV, under the heading " Political Offense", at pp. 115-144.

42.Africa, Supra n, 3 at p. 15.

43.Moreover, recent United States practice indicates that a wide range of violent offenses will not be considered political. For further discussion, see, chapter IV, at pp. 143-44; See also, L.C. Green, International Law; A Canadian Perspective, (1986), at p. 214:

44.G.V. La Forest, Extradition To And From Canada, (1977), at p. 1.

45.Supra n, 31.

46.Supra n, 32.

47.This treaty provided in Art. III, that

> " ... If any the subjects of the said Kings shall presume to offend herein, then every of the Kings whose subjects shall have so offended, shall be bound to inflict most severe punishments upon them, as league breakers and seditious persons." In 6 C.T.S. (1661) 234, at pp. 245-246.

48.This treaty provided in Art. 14, that

> " ... in case ... anything shall be done or attempted by any of the subjects or inhabitants of either party ... those particular persons shall be punished, who have offended against this treaty ...." In 7 C.T.S. (1662) 193, at p. 218.

49.Supra n, 32 at pp. 18-22.

50.52 C.T.S. 243, at p. 263.

51.56 C.T.S. 289.

52.This treaty never came into force owing to the renewal of the war. See 6 British Digest of International Law, (1965), at p. 445.

53.Id.: Art. 9. of the Treaty of 1815 provided that;

> " All Europeans and others whosoever, against whom judicial proceedings shall be instituted within the limits of said settlements or factories belonging to His Most Christian Majesty, for offences committed, or for debts contracted within the said limits, and who shall take refuge out of the same, shall be delivered up to the chiefs of the said settlements and the factories; and all Europeans others whosoever, against whom judicial proceedings as aforesaid shall be instituted, without the said limits, and who shall take refuge within the same, shall be delivered up by the chiefs of the said

> settlements and factories, upon demand being made of them by the British Government." In 63 C.T.S. 487, at p. 493.

54.93 C.T.S. 415.

55.Id., at p. 422.

56.Supra n, 50.

57.For the text of the treaty see, 94 C.T.S. 177.

58.Supra n, 1 at p. 13.

59.33-34 Vict. c., ch. 52 (1870).

60.Supra n, 52 at p. 447.

61.108 C.T.S. 145, at p. 158.

62.Although this treaty was never enforced, it may be argued that it did influence the future by making a significant contribution in the development of the political offence as an exception to the law of extradition. And may now be seen in the latest practice which defines extraditable crimes by reference to their punishment.

The trial or punishment of a person for an offense other than the one for which his/her extradition was obtained is in conflict with the rule of speciality; See infra n, 87.

63.The decisions given by the courts of the following states in the respective cases confirms this practice for e.g., Colombia, Re Bachofner (1959),in 28 I.L.R. 322; Chile, see Re Vigoni (1950), in 17 I.L.R. 263; Venezuela, see Re Vargas Chacón (1950), in 17 I.L.R. 265; Argentina, Re Artaza (1951), in 18 I.L.R. 333; Switzerland, N v. Public Prosecutor of the Canton of Aargau (1953), in 20 I.L.R. 363:

64.McNair, II International Law Opinions, (1956), at p. 87; See also, 6 British Digest, Supra n, 52 at p. 453:

65.[1963] 2 Q.B. 243 at p. 300.

66.Art. 3 of the French Extradition Law of 1927 provides

> " The French Government may deliver to foreign Governments, at their request every person not French or French ressortissant ...." For the text of the Law see, 29 Am.J.Int'l.L., (supplement), (1935), at p. 380.

67.Art. 16(2) of the Constitution of Federal Republic of Germany, ' expressly prohibits the extradition of German nationals.' For the text of the Constitution, see, Peaslee, III Constitution of Nations, (1965), at p. 361.

68.See example, Bill No. 1306 of 25 July 1977, in Theodor Meron, Non Extradition of Israeli Nationals and Extraterritorial Jurisdiction; Reflections in Bill No.1306, in 13 Is.L.R. (1978), at p. 215.

69.Supra n, 50.

70.Supra n, 1 at p. 27; See the case of James Thornley (1864), in 6 British Digest, Supra n, 52 at p. 460:

71.157 C.T.S. 213. For example, Art.1 of the Treaty provided that;

> " Her Majesty the Queen of United Kingdom of Great Britain and Ireland engages to deliver up, under the circumstances and on the conditions stipulated in the present Treaty, all persons, and the Swiss Federal Council engages to deliver up, under the like circumstances and conditions, all persons, excepting Swiss citizens ...." Id., at p. 215.

72.168 C.T.S. 173, at p. 176.

73.169 C.T.S. 225, at p. 226.

74.[1896] 1 Q.B. 230, at p. 235.

75.28 U.S.T.-T.I.A.S. 8468.

76.377 U.N.T.S. 331:

77.Supra n, 68.

78.For the text of the Act, see, Supra n, 59.

79.Supra n, 32, Appendix iii.

80.Sir James Stephen, II History of the Criminal Law of England, (1883), at pp. 70-71.

81.For further discussion see Chapter IV, at p. 123.

82.[1891] 1 Q.B. 149; For further discussion on this case see Chapter IV at p. 122.

83.See Chapter IV, at pp. 123-144.

84.Supra n, 32 at 208.

85.Supra [illegible] 1 at p. 12.

86.For the text of the treaty, see, Supra n, 61.

87.In accordance with this rule a person surrendered shall not be tried for any other offense than the one for which the surrender was made. However, for more detailed discussion on this topic, see Chapter III, at pp. 93-104.

88.By conflicting requisition is meant the request for extradition of the accused by more than one state for the same or different offense.

89.Supra n, 61; See also, IX Hertslet's Commercial Treaties, (1856), at p. 289.

90.Africa, Supra n, 3 at pp. 16-17.

91.For the text of the Treaty see, 84 C.T.S. 457.

92.95 C.T.S. 393.

93.Id., at p. 396.

94.Art. 2 of the convention enumerated the following crimes as extraditable;

> " murder (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide and poisoning,) or with an attempt to commit murder, or with rape, or with forgery or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment." Id., at pp. 395-396.

95.Africa, Supra n, 3 at pp. 22-23.

96.Id., at p. 24.

97.Id., at p. 31.

98.'Relative political offense' is an offense in which a common crime is implicit in the political act. Whereas, 'Purely political offense' is an offense against the political organization or the government of a state, injuring only public rights and containing no common crime element whatsoever. See Lora L. Deere, Political Offenses in the Law and Practice of Extradition, in 27 Am.J.Int'l.L. (1933) 247, at p. 248.

99.Africa, Supra n, 3 at pp. 34-35.

Situation of similar nature was created recently in the case of Patrick Ryan, a Roman Catholic priest wanted by the English Government in connection with alleged terrorist offenses. Request for extradition was made by the English Government before the Belgian Government. Although, it appears that the Belgian judiciary was in favour of complying with the British request, the Belgian Government denied the extradition request because of the political implications involved in the case. Instead, Ryan was sent to Dublin (Southern Ireland). " Observers took this to mean that the Belgian Government was alarmed at the prospect of possible IRA retaliation had Ryan, who was on hunger strike, had died in a Belgian jail." See The Times (London), Monday November 28, 1988.

The English Government, then made a request to the Irish authorities for the extradition of Ryan, however the Irish authorities refused extradition. The reason given by Mr. John Murray, the Irish Attorney General was, ' because of the remarks in the British media and the Parliament any prospect of a fair trail for Ryan had been prejudiced.' See The Times (London), Wednesday December 14, 1988.

However, Ireland agreed that, if United Kingdom requested, Ryan would be brought to trial in Ireland in accordance with Ireland's Criminal Law Jurisdiction Act. See The Times (London), Wednesday December 14, 1988.

100.Africa, Supra n, 3 at p. 35.

101.For the text of the Treaty, see, 156 C.T.S. 437.

102.See the provision made by the French Criminal Code of Procedure, Art. 227; Africa, Supra n, 3 at p. 115:

103.According to the ' Objective Test', an offense derives its character not from the motive of the offender, but rather from the nature of right it injures. See in Re Giovanni Gatti, 14 Annual Digest (1947) 145, at pp. 145-146; For further discussion see Chapter IV, at p. 121:

104.See Chapter IV, at pp. 138-143.

105.For the Text of the Law, see 29 Am.J.Int'l.L., (Supplement), 1935, at p. 380.

106.Henry P. de Vries, Regina B. Loening, French Law, (1981), at pp. 9-12.

107.However, the Canadian practice is different as the Canadian Extradition Act, in Part II, section 35, states that the Act may be extended to any foreign state irrespective of treaty, where a proclamation has been made by the Governor General. See, Extradition Act (R.S.C. 1970, c.E-21).

108.Supra n, 1 at pp. 25-26.

109.Id., at pp. 30-31.

110.Supra n, 105.

111.Supra n, 50.

112.Supra n, 54.

113.95 C.T.S. 393.

114.Supra n, 1 at p. 16.

115.Supra n, 32 at p. 28.

116.Id., at pp. 28-29.

117.Id., at p. 30.

118.J.B. Moore, IV International Law Digest, (1906), at p. 240.

119.Id., at p. 241.

120.(1872) 50 N.Y. 321.

121.299 U.S. 5, at p. 8.

122.4 Johns Ch. 106 (N.Y. Chancery Ct. 1819).

123.Supra n, 32 at p. 45.

124.10 S & R 125

125.Id., at p. 131.

126.154 Fed. 410, (C.C.A. 5th 1907).

127.18 U.S.C. Sec. 3181 & 3184; See also, Factor v. Laubenheimer, where it was held by the Supreme court of the United States that, " the principles of international law recognise no right to extradition apart from treaty." 290 U.S. 276, at p. 287 (1933).

128.*Restatement of The Law Third, The American Law Institute*, (1987), at p. 559.[Hereinafter referred to as " *Restatement*"]

129.*Id*., at pp. 566-567.

130.*Id*., at p. 567.

131.The *Restatement* in section 477, states the ' doctrine of speciality',which provides that ' a person surrendered shall not be tried for any other offense than the one for which the surrender was made, unless the requested state consents. *Id*., at p. 578; For more detailed discussion on this topic, see Chapter III, at pp. 93-104:

132.27 *I.L.M*. 422, at p. 423.

133.The *Extradition Treaty*, between the Government of United States and The United Kingdom (1972), provides in Art. III 1(a), that,

> " Extradition shall be granted ... if;
>
> (a)the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;"

Supra n, 75; However, death penalty has for the main part been abolished [illegible] the United Kingdom, see Chapter IV, n. 269:

134.The *Extradition Treaty* between the Government of United States and Italy, (1983), contains the following provision in Art.II(1);

> " An offense, however denominated,shall be an extraditable offense,if it is punishable under the laws of both Contracting Parties by deprivation of a liberty for a period of more than one year or by a more severe penalty ....", in 24 *I.L.M*. 1527.

135.See Art. IV(2), *Supra* n, 132 at p. 424.

136.See, the *Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Act of Terrorism*, (1985), Art. 1, in 24 *I.L.M*. (1985) 1105, at pp. 1105-1107.

137.For a detailed study on ' political offence', see Chapter IV at pp. 115-144.

138.95 C.T.S. 393.

139.119 L.N.T.S. 247, at p. 252.

140.14 U.S.T.-T.I.A.S. 5476, 1707 at p. 1710.

141.See the Reporter's Note 5, in the Restatement, Supra n, 128 at pp. 574-575.

142.See Chapter IV at pp. 124-134.

143.Supra n, 132.

144.Supra n, 136.

145.See Chapter IV, at pp. 125-135.

CHAPTER II

1. " EXTRADITION - GENERAL INTRODUCTION"

The term " extradition" is defined by the United States court in the case of Terlinden v. Ames, (1902),[1] as follows;

> " For extradition, as the term has been understood for many centuries, is the formal surrender based upon reciprocating arrangements, by one nation to another of an individual accused or convicted of an offence outside its own territory and within the jurisdiction of the other which, being competent to try and punish him, demands the surrender."

It should however be noted that extradition is granted only if the terms of the treaty are satisfied. Moreover, every sovereign state is vested with a right to either refuse or to grant admission to an alien who may come to seek it, this right of a state is recognised as a fundamental act of sovereignty. This view was upheld by the I.C.J. in Colombia - Peru Asylum Case in 1950,[2] when the court said; " This competence is nothing more than the inevitable results of the normal exercise of territorial sovereignty."

Nevertheless, states may voluntarily limit their own liberty by entering into treaties or international agreements with other states or international organisations. However, apart from treaties or international agreements, sometimes, unilateral declaration by a state may bind that state in its international relations with other states.[3]

A provision of this type in extradition law has been embodied in section 35 of the Canadian Extradition Act,[4] which provides in Part II, under the heading ' Extradition irrespective of treaty,' that;

> Sec. 35(1) " This part does not come into force, with respect to fugitive offenders from any foreign state, until it has been declared by proclamation of the Governor General to be in force and effect as regards such foreign state, from and after a day to be named in the proclamation."

Such a proclamation, has been issued extending the operation of the Extradition Act to India.[5] However, the Extradition Act in Section 35 (2), reserves the right to terminate such proclamation,[6]

> " Where by proclamation the Governor General declares this part to be no longer in operation as regards any foreign state, the provisions thereof shall cease to have any force or effect with respect to fugitive offenders from such state from and after a day to be named in such proclamation."

Thus, as far as the liberty of states is concerned, extradition is one of the means whereby a state voluntarily limits its liberty of action by virtue of a treaty, reciprocity or national legislation.

1.1 TREATIES;

Treaty[7] is one of the bases of extradition and,

> " the form of international cooperation in the suppression of crime consists very largely of international commitments, whether of a bi - lateral or a multilateral nature."[8]

Although, states profess adherence to bi-lateral treaties as the legal bases of extradition, the recent tendency of states to rely increasingly upon multilateral treaty cannot be denied.[9] And normally, ' extradition is only granted in cases and in conformity with the conditions formally prescribed in the treaties.'[10] Thus, in the case of Salim Chacur(1958),[11] the Argentine Supreme Court said;

> " It is the established jurisprudence of this court that where an extradition treaty is in existence the extradition process must be carried out in conformity with the provisions of the treaty."

Similarly, in the case of Marsal Marcé, (1960),[12] the Supreme court of Colombia, said; " where the terms of an extradition convention specifically list the offences for which extradition may be granted, the request must conform thereto."

Thus, when a treaty exists it is imperative that the request for extradition must satisfy the terms of the treaty.

1.2 NATIONAL LAWS;

States are under no legal obligation to extradite in international law in the absence of a treaty, they do, however enact national laws qualifying extraditable offenses for their guidance, and these laws are applied in accordance with the practice followed by that state. Such offenses may be stated in the National Laws either by enumerating, i.e., providing a list (of extraditable offenses) for which extradition shall be granted[13] or by reference to the maximum or minimum penalty required to justify extradition, i.e., the eliminative method.

National laws may be applied to interpret both the problems arising out of the provisions of the treaty and provisions which are silent within the treaty, as may be observed from the case of United States v. Robins(1799).[14] This case arose shortly after the Jay Treaty of 1794.

' Jonathan Robins, stood accused of murder on board the British frigate Hermione, in 1791, an extraditable offense under the Jay Treaty. However, the treaty made no provisions for the judicial hearing or the manner in which the proceedings were to be undertaken. Various questions were raised on behalf of the accused by his counsel, such as, whether a citizen of the United States shall be tried by a jury of his own country, or in a foreign one; that the provision of the treaty, on which this motion was founded is contrary to the constitution of the United States and therefore void; that treaty can only relate to foreigners; question was also raised as to the term " jurisdiction", as used in Art 27[15] of the treaty.'[16]

The court in this case,[17] said, " ... the treaty has been recognised by the legislature of the United States and is now in full operation ..." The decision of the court was that the treaty was self - executing and hence extradition was adjudicated by the court on the request of the President or Secretary of State. This case lead to the passing of the Extradition Statute in 1848 by the Congress.[18] This statute made provision ' that extradition was to be undertaken by virtue of a treaty and subject to judicial proceedings in Federal District court in accordance with the provisions of the statute.'[19]

Thus, ' in the United States at present, there is no executive discretion to seize a fugitive criminal and surrender him/her to a foreign government except as provided for by statute or treaty.'[20] Decision to this effect was also given in the case of Valentine et al v. United States ex rel Neidecker, (1936),[21] when the U.S. Supreme court said;

> " Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that this power, in the absence of statute conferring an independent power, must be found in the terms of the treaty."

This provision has been codified in the United States Code,[22] in Sec.3181 which expressly provides that;

> " The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government."

England supports the doctrine ' that in the absence of express legal authority the government cannot send a fugitive out of the country to be tried for an offence committed abroad.'[23] Nevertheless he/she may be deported[24] to such a country, and " the order may not be rendered invalid merely because its consequence will be that the deportee will serve a sentence for crime in his own country."[25]

It is submitted that states have a discretion to deport an undesirable alien,[26] and they sometimes use this method as an alternate to extradition. But, extradition and deportation are two different concepts.[27] In extradition a fugitive is only surrendered upon the formal request by the state claiming jurisdiction over an offence and the extradition takes place only after the observance of the formalities as provided by the respective treaty and extradition statute of the state requested. Whereas a deportation order is made on the ground that the deportation of an alien is deemed conducive to the public good. And, states do sometimes exercise the right to deport in response to a request for surrender by a foreign country which is known as " disguised extradition",[28] as may be observed from the Soblen Case, (1963), where it was held by the court that;[29]

> " The deportation order was valid, and the application for the writ of habeas corpus would be refused because ... (iii) that deportation was an act of an executive, not of a judicial or quasi - judicial character and, accordingly, an alien was not entitled to an opportunity of submitting representations against the making of the order."

Lord Denning M.R., said that;[30]

> " The third ground of challenge was that it was said that the Home Secretary could not make the deportation order unless he had first given the person affected the opportunity to be heard, and in this case the Home Secretary had made this deportation order against Dr. Soblen without any such opportunity being given. I quite agree that when a public officer is given the power to deprive a person of his liberty or his property, the general principle of our law is that that is not to be done without his first being given an opportunity of being heard and of making representations on his

> own behalf ... But there are exceptions. A statute may expressly or by necessary implication provide that the person affected is not to be given a right to be heard. Such an exception has been held to exist in the case of deportation orders ...."

The decision of the English court clearly indicates that in England, the executive reserves an absolute right in this matter.[31] On the other hand, states have the right to admit or expel aliens for the public good and security of state and normally these processes are covered by an Aliens Order Act and the Immigration Act,[32] whereas the process of extradition lies exclusively under the provisions of the Extradition Act and treaties.[33]

The author is of the opinion that states should not encourage deportation as a means for extradition when judicial procedures for extradition are available. Moreover, bolstering the idea of deportation as an easy way of extraditing a fugitive weakens the structure of extradition, as states would probably prefer to resort to deportation rather than going through the cumbersome process of extradition.[34]

1.3 RECIPROCITY;

Treaties between states are deemed to be based upon a reciprocal arrangement, as

> " Treaties consist in giving concrete expression to the rules of reciprocity in spheres in which, on the basis of mutuality, states are willing to put certain limitations on the exercise of their unfettered national sovereignty."[35]

However, rules of reciprocity also operate in the absence of a treaty and are found to be incorporated in the national statutes of several states. Thus, provisions to this effect are to be found in the national statutes of Israel,[36] Hungary,[37] Venezuela,[38] Brazil,[39] etc., and the courts of several states in their decisions have affirmed the necessity of this rule. For example, in Re Vigoni, (1950),[40] ' the Argentine authorities sought from Chile the extradition of Humberto Vigoni. Vigoni an Italian national was accused of smuggling. As no extradition treaty existed between the Government of Argentine and Chile, the Supreme court of Chile said in its decision that;[41]

> " ... the Argentine Government has not offered ... reciprocity in analogous cases, without which, in the absence of treaties, it is generally agreed that extradition may not be granted."

and extradition was therefore denied.

Similarly, in In re Vargas Chacon, (1950),[42] ' the Criminal Court of First Instance of Venezuela made a petition to the Supreme Court, for a decision by that court on the question of whether or not a request should be made to the Mexican authorities for the extradition of Felix Vargas Chacon, a Venezuelan citizen detained in the city of Mexico. Vargas had been indicted and an order for his detention had been issued in Venezuela on the charge of criminal fraud. There was no extradition treaty between the Government of Republic of Mexico and Venezuela.'[43]

It was held by the Supreme Court of Venezuela, that;[44]

> " ... a request for the extradition of the accused should be made to the Government of the Republic of Mexico."
>
> " The court found that the indictment and order of detention conformed to the requirements of Venezuelan law; that criminal fraud was an extraditable offence under the norms of international law; and that the request for extradition will properly be made, even though there was no special treaty on the subject between Mexico and Venezuela, on the basis of reciprocity as well as under Article 344 of the [Bustamante] Code ..., providing for the delivery of persons convicted or indicted for common crimes."[45]

Thus the Supreme Court of Venezuela in view of the Venezuelan Code of Criminal Procedure and under Article 344 of the Bustamante Code, decided that the request for extradition should be made to the Government of Republic of Mexico on the basis of reciprocity.[46]

Whereas, in Switzerland ' the Swiss legislation empowers the Federal Council to grant extradition, even in the absence of an extradition treaty. And in exceptional cases even without reserving the right to reciprocal treatment if conditions laid down in the law are satisfied.'[47] The German practice on the other hand is stated in the Law on International Assistance in Criminal Matters, (1982), which provides in Part II section 5 under the heading reciprocity that,[48]

> " Extradition shall be granted only if, on the basis of assurances given by the requesting state, it can be anticipated that the state would execute a comparable German request."

This provision of the German legislation indicates its application in the presence of reciprocity and may be applicable either in the presence or in the absence of a treaty.

2. BASES OF JURISDICTION;

States apply different principles in exercising their penal jurisdiction, thus the main thrust of this unit is to describe the various jurisdiction exercised by states under criminal law. Although, not all of these principles may be a valid ground for an extradition request nevertheless the importance of these principles cannot be ignored.

" The first substantive aspect of extradition is the determination of the requesting state's jurisdiction over the subject matter for which the individual is sought."[49] In the absence of any valid jurisdiction, the request for extradition is not granted.[50] The term ' jurisdiction' has been widely used in the spheres of both domestic and international law, and the term as used in international law is the exercise of power by a state over events, persons and property. ' States under international law, have the capacity to make rules of law and enforce them, this capacity being used in the former case by the legislative or some other branch of government and in the latter by the judicial or executive branch of government.'[51]

Jurisdiction as one of the essential elements of the law of extradition may be observed from the case United States of America v. Link and Green, (1954),[52] as one of the reasons for the dismissal of the extradition application as stated by the Superior Court of Quebec, Canada, was the lack of jurisdiction on the part of the Michigan Federal Court. The relevant facts of the case are as follows; ' Request for extradition of the accused Link and Green was brought by the Department of Justice of the United States of America, based on warrants issued for the arrest of the two accused in the United States District court for the Eastern District of Michigan dated May 6, 1954. The charges against the accused concerned fraud based on letters posted from Montreal to the United States.
Scott A.C.J., held that; " ... on its true interpretation para 11 B of the Supplementary Convention[53] did not give the Michigan Federal Court jurisdiction..."[54]
Therefore, because the letters were posted from Canada the United States codes under which the charges were brought was held to apply only to mail frauds in the United States. Consequently the extradition request of the United States was dismissed.

On the other hand, the Restatement of the Law Third, Foreign Relations Law of the United States, in section 402 provides the following bases of jurisdiction to prescribe;[55]

> " ... a state has jurisdiction to prescribe law with respect to

> 1(a) conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> 2. The activities, interests, status or relations of its nationals outside as well as within its territory; and
>
> 3. Certain conduct outside its territory by persons not its nationals that is directed against the security of the state or a limited class of other state interests."

However, the requesting state in order to have a valid jurisdiction should have (i) prescriptive jurisdiction i.e., jurisdiction over the offence, and (ii) enforcement jurisdiction, i.e., jurisdiction over the person, as both elements are necessary in most states before a criminal prosecution may proceed.

A state may claim jurisdiction on different grounds and the claim to jurisdiction that have been utilised by states are;[56]

(i) Territorial jurisdiction

(ii) Nationality or Active personality;

(iii) Passive personality;

(iv) Protective principle; and

(v) Universal principle.

2.1 Territorial Jurisdiction;[57]

> " The primary basis of criminal jurisdiction is territorial. The reasons for this are obvious. States ordinarily have little interest in prohibiting activities that occur abroad and they are, as well, hesitant to incur the displeasure of other states by indiscriminate attempts to control activities that take place wholly within the boundaries of those other countries."[58]

" The theory of ' territorial jurisdiction' or ' territorial principle' is the criterion by which a state prescribes and enforces rules of conduct within its physical boundaries."[59]

The term ' territory' and ' jurisdiction' on the other hand however, are found to be used as coterminous whereas they are not and do carry different meanings. In fact ' territory' is the object upon which ' jurisdiction' is exercised, and Professor Bassiouni is of the opinion that;[60]

> " Jurisdiction is a legal theory whereby a political entity, namely a state, claims the power to prescribe and enforce its laws, while territory is the object upon which jurisdiction is exercised."

Jurisdiction on the other hand may be classified into different categories and the categories of jurisdiction as defined by section 401 of the Restatement are as follows;[61]

> " Under International law, a state is subject to limitations on
>
> (i) Jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
>
> (2) Jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in

> criminal proceedings, whether or not the state is a party to the proceedings;
>
> (3) Jurisdiction to enforce, i.e., to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action."

The application of the territorial principle may be made in two different ways, viz.;

(i) Subjective; and

(ii) objective:

i. Subjective;

This theory implies that an act may be committed in the place where it is commenced, or if one of the constituent elements occurs within that territory. Thus, in the case of Murray A. Libman and Her Majesty The Queen, (1985);[62]

> " The Appellant stood accused of seven counts of fraud arising out of the conduct of his Toronto sales solicitation room. Pursuant to appellant's directions, his telephone sales personnel telephoned U.S. residents and induced them to buy shares in two Central American companies, engaged in gold mining in Costa Rica. The evidence tendered at the preliminary inquiry inferred that these shares were virtually valueless. The money received from the share purchase was sent to Central America, where appellant received his share to take back to Toronto.The basic point raised by the Appellant was that the offenses occurred outside Canada, and could therefore, not be prosecuted in Canada. Ontario Court of Appeal held that the Appeal was dismissed."

La Forest giving the judgement for the Supreme Court of Canada said,[63]

> " ... the preparatory activities to perpetrate the fraudulent scheme were in themselves sufficient to warrant a holding that the offense took place in

> Canada. The scheme was devised here, the whole operation that made it function, ... were situate in Toronto. The fact that this approach would catch cases where the victims were harmed outside the country makes no difference."

The court in this case established its jurisdiction on the basis that a significant portion of the activities had taken place in Canada.[64]

ii. The objective theory;

This theory provides that the state where the act is consummated, or where the last constituent element occurs or its effects are felt possesses jurisdiction over the offence. Thus in R. v. Godfrey, the applicant was extradited for false pretences in Switzerland although he had not been in that country when the pretences were made.[65] Similarly, in R. v. Treacy, (1970),[66] 'the English court, when challenged on the issue of jurisdiction, by an appellant who had posted a letter to Mrs. X in West Germany demanding money with menaces, objected that the court had no jurisdiction to try the case because the offence had been committed outside England.' Lord Parker C.J., delivering judgement said; " ... we are willing to assume for the purpose of this appeal that the last constituent element does determine the place where the offence is committed." Hence Treacy was convicted for the act of trying to blackmail Mrs. X in West Germany, his act of blackmailing being deemed to be completed as soon as he posted the letter in England. Similar decision was handed down by the Canadian court in Re Chapman.[67]

The theory of territorial principle purports to extend the concept as states according to this theory may apply jurisdiction over an offense, though not entirely consummated within the state's territory if the preparation or the effect[68] of the crime occurred in the state. Thus the Swiss Court of Cassation on October 27, 1955, in the case of Novic v. Public Prosecutor of the Canton of Basel - Stadt,[69] rejecting the appeal by Novic, held that; " An offence which takes effect in Switzerland must be considered to have been committed here," the court further said;

> " Art.7 of the Penal Code provides that an offence must be deemed to have been committed not only in the place where it is carried out, but also in the place where it takes effect."

The traditional Anglo - American practice on the other hand was largely dictated by the strict territoriality of crime; this basis is strongly evident in the reasons given by the Royal Commission on Extradition in 1878 for the extradition of nationals, when it was said;[70]

> " The offence is an offence against the law of the country in which it is alleged to have been committed. A person commorant in a foreign country owes obedience to its laws in exchange for the protection which it affords him, as much as one of its proper subjects. Why, because he has escaped beyond the jurisdiction of that law, should an offender, whose surrender is asked for, be in a different position from that in which he would have been in the country from which he escaped ?"

However, the concept as understood earlier has undergone considerable change. The extension of this principle authorises a state to try aliens acting outside its territorial boundaries if the offence has had an impact within the territory of that state. And, the extension of this principle is normally made in the internal law of the states or in the treaty between them or both, and criminal jurisdiction is exercised accordingly.

Recent treaties between states make provision for the extension of this rule for example, Art III of the Extradition Treaty concluded between the United States and Italy, (1983), provides;[71]

> " When an offense has been committed outside the territory of the Requesting Party, the Requested Party shall have the power to grant extradition if its laws provide for the punishment of such an offense or if the person sought is a national of the Requesting Party."

Similarly, the Protocol concluded between Canada and United States, (1988), contains in Art.III(2), the following;[72]

> " (2) when the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or the other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested state may, in its discretion, grant extradition."

Thus, the Protocol gives the executive authority of the requested state a wide discretion to grant extradition, even if the laws of the requested state do not provide jurisdiction over such an offense committed in similar circumstances. As the Protocol expressly states the executive authority of the requested state may grant extradition even if the laws in the requested state do not so provide. This provision has been inserted as an extra precautionary measure so that serious crimes such as acts of terrorism may not go unpunished for the simple reason that the act was not punishable in the requested state.

And, whenever courts are faced with the problem of acts committed outside the jurisdiction of a state but having effects within it, it is presumed that the offender was present in the state where the effects of the act took place and which requests that actor's delivery. This was indicated in Christopher Strassheim v. Milton Daily, (1910),[73] when the Supreme Court of the United States said;

> " Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."

2.2 NATIONALITY or ACTIVE PERSONALITY;

This theory, like that of " territorial jurisdiction" is based upon state sovereignty whereby a state exercises its competence over the acts of its nationals committed abroad. The Harvard Draft Convention on Jurisdiction with Respect to Crime, (1935),[74] after reviewing the legislation of different states asserting this theory classified them according to the offenses made punishable as follows;

" (i) All offenses;

(ii) All offenses which are also punishable by lox loci delicti;

(iii) All offenses of a certain degree;

(iv) Offenses Against co - nationals; and

(v) Certain enumerated offenses only."

The theory of ' nationality' ensures that a national of a state is brought to justice, even for offenses committed abroad, for example, in Kaiser and Attenhofer v. Basle,(1950),[75] the Swiss Federal Tribunal rejected the appeal by Kaiser and Attenhofer holding that Switzerland had independent authority to try its nationals for offenses committed abroad. The court said in its judgement that;

> " Each State itself determines on what conditions persons shall be subject to its criminal law. Thus Switzerland claims the right to punish offenses committed abroad if its interests so require, as for instance offenses against the state or against Swiss nationals..."

Similarly, in Public Prosecutor v. J.M.H., (1957),[76]

> " M. a member of the Dutch armed forces was found guilty by the Army Mobile Court Martial abroad, sitting at Seedorf, West Germany, of possessing a firearm contrary to Article 3 of the Dutch Firearms Act. On appeal to the Supreme Military Court the defendant pleaded that the Dutch Firearms Act was not applicable in West Germany, and that the act alleged against him was allowed under the German Weapons Act. The Supreme Military Court dismissed the appeal contending that, on the one hand, the Dutch Firearms Act had extra-territorial effect and, on the other hand, that Article 4 of the Code of Military Criminal Law declared the Dutch Penal Law

> - in the widest sense - applicable to soldiers who had committed an offence outside the Netherlands, even if the offence was not punishable under the laws of the country where it had been committed or was not otherwise punishable."

The Jurisdiction to prescribe on the bases of nationality has been mentioned in the Restatement[77] as well. This theory also finds mention in the Extradition Treaty concluded between Italy and the United States, (1988), in Art.III.[78] and the Criminal Justice Act, (1988),[79] of England.

2.3 PASSIVE PERSONALITY;

In accordance with this principle a state claims jurisdiction over crimes committed abroad by aliens against its nationals on the ground that a state has the right to protect its nationals.[80] However, strong opposition was expressed against the application of this theory, as the Harvard Draft Convention on Jurisdiction with Respect to Crime, states;[81]

> " Jurisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence. It has been vigorously opposed in Anglo - American countries."

Nevertheless, this statement has been overrun by recent developments. And the practice of the United States at present seems to be different from the one stated by the Harvard Draft in 1935. As the Restatement in its comment states that;[82]

> " The passive personality principle asserts that a state may apply law - particularly criminal law - to an act committed outside its territory by a person not its national where the victim of the act

> was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks, or to assassination of a state's diplomatic representatives or other officials."

The Restatement recognizes this principle however, some may argue that the Restatement is not the law and it only represents the opinion of the American Law Institute. But, it may be said that the opinion expressed in the Restatement purports to restate the law and reflects the rules that would apply in deciding a controversy in accordance with international law as understood by the United States.[83]

This principle has also been recognized by the Act to Combat International Terrorism[84] enacted by the United States in 1984, which gives a broad definition to act(s) of terrorism. The Act however is confusing, as section 3071 of the Act is applicable only " With respect to acts of terrorism primarily within the territorial jurisdiction of the United States ... "[85] Whereas sec. 201 (a)(2) of the Act does seem to support the idea of " passive personality", as it urges " extradition of all terrorists and their accomplices to the country where the terrorist incident occurred or whose citizens were victims of the incident."[86]

However, this latter section is only ' a policy oriented section' as it only " urges" to seek more effective international cooperation in combating international terrorism. Moreover, the provision of Sec.201 (a)(2) is rendered ineffective where the internal law of the state requested prohibits extradition in the absence of a treaty.

2.4 PROTECTIVE PRINCIPLE;

' This principle has a much broader application as states in accordance with this theory exercise jurisdiction over acts committed abroad that are prejudicial to their security, territorial integrity and political independence.'[87] States in accordance with this theory assert jurisdiction beyond their territorial boundaries over certain acts which threaten their interests.[88] ' The practical justification of this principle is the inadequacy of national legislation in punishing offenses committed within their territory against the interests of foreign states.'[89]

The Restatement recognizes this theory as it states in section 402(3) that;[90]

> " ... a state has jurisdiction to prescribe law with respect to
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."

The importance of this principle may be illustrated from the 1972 amendment to the Israeli Penal Law[91] which gives a broad jurisdiction to the Israeli courts to try;

> " ... Offenses committed abroad ... which would be an offense if it had been committed in Israel and which harmed or was intended to harm the state of Israel, its security, property or economy ..."[92]

This legislation was applied for the first time in the case of Faik Bulut.[93] Bulut was a Turkish citizen captured in Lebanon and tried in Israel for being a member of an organisation Al - Fatah, and was sentenced to seven years in prison.[94]

The provision of the amendment under which Bulut was tried was intended to broaden Israeli protective jurisdiction and the military court relied on the protective principle in upholding the validity of the statute.[95] The exercise of protective jurisdiction in Bulut's case is based on a broad interpretation of that principle. As the charges against the defendants were merely the membership of an organization which would have endangered the security of Israel only in an indirect way.[96]

On the other hand the effects of the expansion of extraterritorial jurisdiction may be summed up as;[97]

> " 1) Infringement of freedoms that some nations guarantee their citizens, for e.g., freedom of association. And, prosecution of a person, for being a member of an organization in another country (though some members of the group may be guilty of serious crimes), in the name of which illegal acts were committed by others would appear an undesirable form of guilt by association.
>
> 2) Second effect of this expansion is to increase the likelihood of subjecting an individual to penal sanctions for actions he unlikely to know were illegal."

And, if the criminal jurisdictions are to be overly expanded it becomes less reasonable to hold someone accountable for them because of the number and variety of laws that would then be applicable to him/her. However, the 1975 amendment to the French Penal Code is more favourable as it provides;[98]

> " Every foreigner who outside the territory of the Republic renders himself guilty, either as perpetrator or as accomplice, of a felony or misdemeanour against the security of the state ... or of a felony against French diplomatic or consular agents or offices may be prosecuted and tried according to the provisions of French law if he is arrested in France or if the Government obtains his extradition."

The provision of the French legislation apart from expanding the jurisdiction " does so in a clearly defined and limited fashion, focusing only on particular targets of terrorist activity and establishing that they must be of a minimum degree of gravity, namely a felony."[99]

The theoretical basis for the protective principle is the right of self defence,[100] yet offenses categorised under this principle may however be difficult to relate to extradition as such offenses will normally be considered as politically oriented and thus non extraditable. Hence in case of denial of the request for extradition, states are devoid of executing the appropriate provision of their penal legislation under this principle.

2.5 UNIVERSALITY PRINCIPLE;

The principle of universality as compared to other principles observed so far rests on a different rationale. According to this theory the general assumption is that a state may exercise jurisdiction over certain offenses whoever commits them and wherever they are committed. But the " opinion most often expressed is that such a basis ought only be used for serious international crimes."[101]

During the early period only ' pirates'[102] were considered to be ' hostes humani generis,'[103] and were subject to the jurisdiction of any state in whose custody they might fall.[104] And, at present jurisdiction relating to the seizure of a pirate ship or aircraft[105] is contained in Art.105 of the U.N.C.L.O.S., (1982).[106] Furthermore, there are some specified offenses which as a result of their universal condemnation are considered to fall within the universal jurisdiction principle. The Restatement for example, specifies piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and certain acts of terrorism as falling under this principle.[107] This author however, finds it difficult to agree with respect to every crime (except piracy and hijacking) enumerated by the Restatement as falling within the scope of this principle. The offenses as enumerated by the Restatement though condemned by the international community as crimes under international law do not prescribe universal jurisdiction upon states to prosecute or extradite such offenders. For example, " slavery"[108] and " genocide"[109] although mentioned in the Restatement are not subject to universal jurisdiction. But as far as " war crimes"[110] and

" crimes against humanity"[111] are concerned, the General Assembly Resolution of 1973[112] laid down principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.[113]

The practice at present however is different because of the treaties relating to the suppression of terrorism. For example, The European Convention on the Suppression of Terrorism[114] provides in Art.6, that;

> " (1) Each contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence ... in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.
>
> (2) This convention does not exclude any criminal jurisdiction exercised in accordance with national law."

However, the European Convention like any other treaty binds only those states which are parties to it. Provision similar to this effect are found in Article 3 of the Convention on the Prevention And the Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, (1973).[115]

In recent years, the international criminal law[116] has come to encompass a broad range of crimes.[117] But, ' in absence of a world legislative body to enact statutory international law and a world body to prosecute and administer punishment to those individuals found guilty of international crimes, each state must act individually to enforce the universality theory.'[118] Thus, in Universal jurisdiction over Drug Offenses Case, (1976),[119] the Federal Supreme Court of the Federal Republic of Germany held that German criminal law was applicable to the illegal sale of drugs abroad. The relevant facts of the case are as follows;[120]

' The accused a Dutch national, belonged to a group named "release", which was established to help young people with difficulties arising from drug abuse. According to the findings of the Provincial Court (Landgericht) the accused sold the drugs by himself or jointly with others or acted as an intermediary. The purchasers, travelled from various parts of the Federal Republic of Germany to meet the accused in the Netherlands, and then proceeded across the border to resell the hashish in Germany. The Provincial court sentenced the accused to three years and nine months imprisonment for repeated violations of the Narcotic Drugs Law. His appeal, in which he claimed the violation of substantive law was dismissed.' The court said;[121]

> " In the struggle against criminality associated with drugs, the German legislation, in Art.6(5) ST GB, has resorted to the principle of the universal application of law... The provisions of Art. 6(5) ST GB find their domestic justification in the Single Convention on Narcotic Drugs, 1961, which was ratified by the Bundestag on 4 September 1973, and entered into force for the Federal Republic on 2 January 1974. It is clear beyond any doubt from the provisions of the Agreement that the signatory States, which include the Netherlands, consider it necessary in the interests of health and the well

> - being of mankind to promote world - wide international co - operation in the fight against criminality associated with drugs. This aim, which is already mentioned in the preamble to the convention, makes it clear that the reference contained in Article 6(5) ST GB to the principle of the universal application of law is at all events not an arbitrary course adopted by the German criminal authorities. Relevant in this regard is Article 36 of the convention which contains the obligation [for the signatory states] to ensure that every offence connected with drugs receives the appropriate punishment... Furthermore Article 36 of the Convention was not intended, as sub - section (3) makes clear, to interfere with the norms of the contracting parties for the applicability of criminal Sections.
>
> The precise meaning of the relevant provisions of the Convention is not, however, decisive. There is in fact no general rule of international law prohibiting the application of the principle of the universality of law in the absence of special provision by international convention. The decision of the German legislator expressed in the provisions of Article 6(5) ST GB cannot therefore be denied legal effect. Indeed up to now it has nowhere been suggested that such effect should be denied."

One of the essential prerequisite for the application of the municipal criminal law of a certain state in a particular case is that the offender be in its territory.[122] Thus, a state in order to exercise jurisdiction under this principle should have the possession of the offender in personam, which can be possible only in presence of an extradition treaty or reciprocity,[123] or if the convention specifically states for the extradition or prosecution of such offender(s). Thus in Demjanjuk v. Petrovsky,[124] (1985), Demjanjuk was extradited to Israel on charge of mass murder of Jews. Upon the issue of jurisdiction, Lively C.J. of the United States Court of

Appeals was of the opinion that the acts for which Demjanjuk was charged could be tried under the universal jurisdiction by the state of Israel. However it may be argued that, had no extradition treaty existed between the United States and Israel, the outcome of the extradition request would have been different. Thus it is submitted that in absence of an International Criminal Court this principle hardly finds any room to operate if the state in possession of the offender (in personam) is unwilling to prosecute or grant extradition. And, as aptly stated by Prof. L.C. Green, that;

> " The only way in which any convention creating a crime defined by international law can be carried into effect is by way of municipal criminal jurisdiction, which in turn depends on municipal legislation."[125]

NOTES;

1.(1902) 184 U.S. 270.

2.I.C.J. Reports, (1950) 266; 18 I.L.R. 349:

3.For example, see the decision rendered by the I.C.J. in the Nuclear Tests Case, where the court said; "... declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations." (1974) I.C.J.Reports 253, at p. 267.

4.R.S.C. 1970, c.E. - 21.

5.119 Canada Gazette, 2 Nov. 1985; The first time such proclamation made was with respect to West Germany,See, SI/74-40, Canada Gazette, 10 April 1974.

6.Supra n, 4.

7.The term "treaty" has been defined in Art. 2(1)(a) of the Vienna Convention on the Law of the Treaties, (1969), as:

> "... an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

In 8 I.L.M. (1969) 679, at pp. 680-681.

8.I.A. Shearer, Extradition in International Law, (1971), at 22.

9.For example; The European Convention on Extradition, (1953), in 359 U.N.T.S. 273.; The European Convention on Suppression of Terrorism, (1976), in 15 I.L.M. (1976) 1272; O.A.S.;Inter - American Convention on Extradition, (1981),in 20 I.L.M. (1981) 723, etc.:

10.Supra n, 8 at 36.

11.26 I.L.R. 525.

12.28 I.L.R. 324, at p. 326.

13.The provisions of the national laws may be applicable in presence as well in the absence of a treaty obligation depending upon the practice followed by the state concerned.

14.27 Fed.Cas. 825.

15.For the provision of the Art.27, See Chapter I, at pp. 8-9.

16.Supra n, 14 at pp. 831-832.

17.Id.

18.9 Stat. 302 (1898), Act of August 12, 1848. Ch. 167.

19.Id., Sec. 1.

20.See, Factor v. Laubenheimer, (1933) 290 U.S. 276, at p. 287; Ramos v. Diaz, (1959) 179 F.Supp. 459, at pp. 460-461:

21.299 U.S. 5.

22.18 U.S.C., Sec. 3181.

23.R v. Governor of Brixton Prison, ex parte Soblen, [1963] 2 Q.B. 243, at pp. 299-300; See also the practice followed by the United Kingdom, discussed in Chapter I, at p. 11.

24." As deportation in international practice is essentialy the unilateral act of the deporting state. The motive behind it is to protect the interests of the deporting state,and not co-operation in the international suppression of crime." See P.O'Higgins, Disguised Extradition: The Soblen Case, 27 Modern Law Review, (1964) 521, at p. 522.

25.The problems arising out of the principles of the law of extradition and deportation were made clear in the case of Ex parte Soblen, when Lord Denning M.R. said,

> " How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.
>
> If therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was lawful or an unlawful purpose.
>
> ... The court cannot compel the Home Secretary to disclose the materials on which he acted, but if

> there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer: and if he fails to give it, it can upset his order. But on the facts of this case I can find no such evidence ..."

Supra n, 23 at p. 302.

26.States sometimes without making a formal request for extradition, apprehend the person sought after who is outside the jurisdiction of the state where the offense was committed, however, this is deemed to be illegal by the municipal law of the place where it occurs and by international law; See, supra n, 8 at 72 and the cases cite therein viz., Antoine Argoud (from Germany-France) 1963; Dennis Higgs (from Northern Rhodesia-South Africa) 1964; See also, P.O'Higgins, Unlawful Seizure and Irregular Extradition, 36 B.Ybk.Int'l.L, (1960), 279; Eichmann Case, 36 I.L.R. 59:

27.Muller v. Superintendent, Presidency Jail, Calcutta, and others, 1955, in 22 I.L.R. 497.

28.Shearer, citing a decision by a French court says that the term was used as early as 1860; Supra n, 8 at p. 78.

29.Ex parte Soblen, Supra n, 23 at p. 246.

30.Lord Denning, M.R., Id., at p. 298.

31.Whereas, regarding the political character of deportation it was said;

> " ... the political character of deportation is not a relevant consideration for the courts but entirely one for the Home Secretary who in his discretion can grant asylum to political refugees."

Id., at p. 264; As for Burma see, Sitaram v. Superintendent Rangoon Central Jail, 1957, in 28 I.L.R. 283; For India see, Muller v. Superintendent Presidency of Jail, Calcutta, and others, 1955, in 22 I.L.R. 497:

32.For example in Canada, under the Immigration Act, any person, other than a Canadian citizen or a domicile of Canada for at least five years and has not lost that domicile, may be deported to any country approved by the minister; See, section 3, 4, 36, in R.S.C. 1970, c. I-2; See also, G.V. La Forest, Extradition to and From Canada, (1970), at p. 37.

33.La Forest, states; that a person who is deported would not be protected under the provisions of the extradition treaties and the Act. Id.

34." Disguised extradition in its various forms is an evasion of the special statutory procedures laid down for extradition and as such ought to be unlawful." P.O'Higgins, Supra n, 24 at p. 539; The French law of 1927 on the other hand expressly states that, "Extradition obtained by the French Government is null if it has been procured (intervenue) in cases not provided by the present law." See Art. 23 of the French Law of 1927, in 29 Am.J.Int'l.L., (Supplement), (1935), at p. 383; The German practice also seems to accept this view, see supra n, 8 at p. 83:

The process of deportation on the other hand is an infringement of the rights of an individual, as the deported individual is deprived of certain safeguards provided by the law of extradition. And consequently the deportee will have to serve a sentence for a crime in the country to which he/she is being deported constitutes no bar, Ex parte Soblen, Supra n, 23 at pp. 298 -300; For example, see also, United States ex rel. Giletti v. Commissioner of Immigration, (1929) 35 F.2d. 687; Moraitis v. Delany, (1942) 46 F.Supp. 425:

35.S.D.Bedi, Extradition in International Law and Practice, (1966), at p. 49.

36.For e.g., Sec. 13 of the Air Navigation (Offences and Jurisdiction) Law, (1971) of Israel, in S.Z. Feller, Reflections of the Speciality Principle in Extradition Relations, in 12 Is.L.R., (1977), at p. 471.

37.Criminal Code of the Hungarian People Republic,(1961),Art. 8(2), cited in Bedi, Supra n, 35 at p. 110.

38.Code of Criminal Procedure of Venezuela,(1915), Art. 389,393; Cited in Bedi, Id., at p. 111.

39.Law No. 2416, of June 28, 1911, in 29 Am.J.Int'l.L., (Supplement), (1935), at p. 367.

40.17 I.L.R. 263.

41.Id., at p. 264.

42.17 I.L.R. 265.

43.Id., at p. 265.

44.Id., at pp. 265-266.

45.Art. 344 of the Bustamante Code, Code of Private International Law, Annexed to the Convention adopted at Habana, February 20, 1928, provides;

> " In order to render effective the international judicial competence in penal matters each of the

> contracting states shall accede to the request of any of the others for the delivery of persons convicted or accused of crime, if in conformity with the provisions of this title, subject to the dispositions of the international treaties and conventions containing a list of penal infractions which authorize the extradition."

In, 86 L.N.T.S. 120, at p. 254.

46.Austria and Germany follow this principle as may be seen from the Austrian Extradition (No.2) Case, 1953, in 20 I.L.R. 364.

47.See, the case N v. Public Prosecutor of the Canton of Aargau, in 20 I.L.R. 363.

48.This law was passed by the Federal Parliament [Bundestag] with the consent of the Federal Council [Bundesrat]. For the Text See (1985) 24 I.L.M. at p. 950.

49.M.C. Bassiouni, International Extradition And World Public Order, (1974), at p. 203.

50.Normally, extradition is granted if the laws of the requested state provide for jurisdiction over such an offense committed in similar circumstances. However, the recent treaty concluded between Canada and the United States has adopted a different approach as the Protocol Amending the Treaty on Extradition between United States and Canada (1988), [Hereinafter cited as "Protocol"] in its Art. 3(2), gives the executive authority of the requested state the power to extradite a person even in an absence of a valid jurisdiction (for further detail see infra at pp. 56-57 of this Chapter); For the text of the Protocol, see 27 I.L.M. 422, at p. 424:

51.Supra n, 49.

52.[1955] 3 D.L.R. 386.

53." The enumeration number 11 in Article 1 of the Supplementary Extradition Convention, signed on Dec. 13, 1900, between the United States and Her Britannic Majesty, is hereby amended to read as follows;

> " ... 11(B) Making use of the mails on connection with schemes devised or intend to deceive or defraud the public or for the purpose of obtaining money under false pretences." ; 86 Can. Gaz. 2106.

54.Supra n, 52 at p. 395.

55.Restatement of the Law third, The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States, Volume I, 1987, at pp. 237-238. [Hereinafter cited as the " Restatement"].

56.See Sec. 402-404 of the Restatement, Id., at pp. 237-254. See also, Supra n, 49 at p. 205.

57.This principle derives its main force from the concept of sovereignty, as sovereignty of a nation within its own territory is exclusive and absolute, within the limits that may be imposed by international law. " This universal recognition of the territorial principle is founded on the two tenets of sovereignty and equality of sovereign states." See supra n, 49 at p. 205.

58.R v. Martin, [1956] 2 All.E.R. 86.

59.Supra n, 49 at p. 205.

60.Id., at p. 208.

61.Supra n, 55 at p. 232.

62.[1985] 2 S.C.R. 178, at pp. 181-182.

63.Id., at p. 211.

64.French and U.S. practice shows adherence to this theory, as
" Art. 693 of the Code de Procedure Penal provides that an offense is considered to have been committed on French territory when an act characterizing one of its elements is accomplished in France." Christopher L. Blakesley, Extraterritorial Jurisdiction, in II International Criminal Law, (ed. M.C. Bassiouni), (1986), at p. 11.

The United States national legislation and jurisprudence have developed the subjective territorial theory which establishes the jurisdiction of the states to prosecute and punish for crimes commenced within the state but consummated or completed abroad. See, Harvard Draft on Jurisdiction with Respect to Crime, [hereinafter referred to as the " Harvard Draft"] in 29 Am.J.Int'l.L., Supplement, (1935), at p. 484. However, it is difficult to say the state requested will necessary grant the request if one of the elements has been accomplished in that country or the effect of the offense is felt in it. See the discussion under " Objective theory".

65.[1923] 1 K.B. 24; See also, *R*. v. *Nillins* [1884], 53 L.M.J.M.C. 157; *A*. v. *Government of Greece* [1969] 3 All.E.R. 293 (H.L.); *Royal Government of Greece* v. *Brixton Prison* [1969]. 3 All.E.R. 1337 (H.L.):

66.[1971] A.C. 537.

67.[1970] 5 C.C.C. 46 (Ont. C.A.).

68.The P.C.I.J. in the *S.S.Lotus* said that;

> " Once it is admitted that the effects of the offence were produced on the Turkish Vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship." *P.C.I.J. Series A. No. 10*, Judgement No. 9, at 23.

69.22 *I.L.R*. 515, at pp. 515-516.

70.Report of the Royal Commission on Extradition,*Parliamentary Papers*, 1878, Vol. 24, *Reports*, at pp. 907-917.

71.24 *I.L.M*. 1525, at p. 1528.

72.27 *I.L.M*. 422, at p. 424.

73.221 U.S. 280.; See also, *Chandler* v. *United States*, (1948 - 1949), in 171 F. 2d. 921; *Kawakita* v. *United States*, (1952), in 343 U.S. 717.

74.29 *Am.J.Int'l.L*., (Supplement), (1935), at pp. 523-539.

75.17 *I.L.R*. 189.

76.7 *Netherlands Yearbook of International Law*, (1976), 340; See also, the case of *Public Prosecutor* v. *C.C.V*., (1975), " where V was convicted in the Netherlands for causing the death of a fellow passenger in West Germany, whilst driving a car under the influence of alcohol." *Id*., at pp. 340-341.

77.See, section 402, where it states; " ... a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status or relations of its nationals outside as well as within its territory." *Supra* n, 55, at pp. 237-238.

78.24 *I.L.M*. 1525, at p. 1528.

79.See Part I, sec. 1(7)(a), in Criminal Justice Act, (1988), of the U.K.

80.The application of this theory is observed in the S.S. Lotus, (1927), as ' Lieutenant Demons of the French ship and Captain of the Turkish Steamship, were both prosecuted by the Turkish Court in pursuance of Article 6 of the Turkish Penal Code, Law 765 of March Ist, 1926. Art.6, which provides:

> " Any foreigner who, apart from the cases contemplated by Article 4, commits an offence aboard to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey ...."

The court was asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish Law. The court said that, ' no rule of international law forbade the Turkish court from assuming jurisdiction in this case, as the effect of the offence had been felt upon the Turkish vessel.' See P.C.I.J. Series A.No. 10, Judgement No.9, at pp. 14-23.

81.29 Am.J.Int'l.L., (Supplement), (1935), at p. 579.

82.Supra n, 55 at p. 240.

83.For example, see, United States v. Pizzarusso, (1968), where the court quoted the provisions of the Restatement (second), Foreign Relations, (1965): For detail see Infra n, 88.

84.24 I.L.M. 1015; The Act defines ' act of terrorism as an activity that -

> " (A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or of any state; and
>
> " (B) appears to be intended -
>
> " (i) to intimidate or coerce a civilian population;
> " (ii) to influence the policy of a government by intimidation or coercion; or
> " (iii) to affect the conduct of a government by assassination or kidnapping.

Sec. 3077 of the Act., at p. 1016:

This Act has been applied for the first time in the case of Fawaz Yunis. Fawaz, is to stand trial in the Federal District Court (Washington) on charges of hijacking a Royal Jordanian airliner in 1985, carrying American passengers.

Fawaz was lured and apprehended in international waters and flown directly to the United States with no stops on foreign soil. This course of action had to be taken as Fawaz lived in Lebanon and there is no extradition treaty between the United States and Lebanon; See, New York Times, Tuesday, Feb.14, 1989:

85.Nevertheless this section is concerned with reward to any individual for the information leading to the arrest or conviction of the person involved in the act(s) of terrorism. 24 I.L.M., Id., at pp. 1015.

86.Id., at p. 1017; For example, see the case of Fawaz Yunis, supra n, 84.

87.Supra n, 49 at p. 259.

88.This theory has been mentioned by the Harvard Draft, in Article 7 as follows;

> " A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the place where it was committed."

In 29 Am.J.I.L., (Supplement), (1935), at p. 543, see also the list of countries provided by the Harvard Draft which have such a provision in their Penal Codes, at pp. 547-551;

And, in United States v. Pizzarusso (1968), the United States Court of Appeals, said;

> " By virtue of this theory a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided that the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems."

In 388 F.2d. 8, at p. 10, quoting the Restatement (second), Foreign Relations, section 33 (1965).

This principle was amply reflected in Attorney - General of the Government of Israel v. Adolf Eichmann, (1961), as one of the basis relied upon by the District court while prosecuting Eichmann was the protective principle. 36 I.L.R. 5:

89.Harvard Draft, Id., at p. 552.

90.Supra n, 55 at pp. 237-238.

91.Law of 6th Nissan, 5732 (March 21, 1972), Penal Amendment (offenses committed abroad) (Amendment No. 4), [5732 (1972)], Sefer, Ha - Chukkim 7, (Israel); cited in J.B. Gaynes, Bringing the Terrorist to Justice; A Domestic Law Approach;, in 11 Cornell International Law Journal, 71 at p. 76.

92.See, section 3(1), ss 2(a), Id.

93.Judgement of Aug. 7, 1973, Slip Op. at 1, 8 (Military court Lod, Israel, in Hebrew), cited in 72 Michigan Law Review 1087 (see notes); See also, Ex Parte Savarkar, [1910] 2 K.B. 1056 (C.A.):

94.A second specification, for which Bulut was sentenced to a concurrent term of four years, charged him with receiving weapons training; 72 Michigan Law Review, Id., at pp. 1087-1088:

95.Id., at p. 1092.

96.Id., at p. 1097. Although, Bulut was also convicted for receiving weapons training, this does not, however, justify the basis for Israeli jurisdiction under the " protective principle". Though it may depend on the circumstances however, receiving weapon training does not necessarily mean a direct threat to one's security.

97.Id., at pp. 1100-1101.

98.Law of July 11, 1975, Law No. 75-624, Arts. 10-14 [1975] J.O. 7220, Dalloz Sirey, Legislation [D.S.L.] 261 (France), cited in J.B. Gaynes, Supra n, 91 at p. 77.

99.Id.

100.Sarkar, The Proper Law of Crime in International Law, in International Criminal Law (G.Mueller & E.Wise ed.) (1965) 50, at p. 68.

101.S.A. Williams and A.L.C. de Mestral, An Introduction to International Law, (1987), at p. 130; The term ' international crimes' has been defined by the United Nations Law Commission, Report on Draft Articles Adopted at the 29th Session; For the Text of the Draft, See, 16 I.L.M. 1251:

102.For the definition of ' Piracy', See, Art. 101 of the United Nations Convention on the Law of the Sea, (1982), The Law of the Sea, Official Text, Published by St. Martin's Press

New York in cooperation with the United Nations, (1983) at 34. [Hereinafter cited as " U.N.C.L.O.S."].

103.L.C.Green, An International Criminal Code - Now ?, 3 Dalhousie Law Journal, (1976) 560, at pp. 561-562; See also, Judge Moore in his dissenting judgement in the Lotus Case, Supra n, 68 at p. 70.

104.Hackworth states that;

> " It has been long recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them."

G. Hackworth, 2 Digest of International Law, (1942), at p. 681.

105.See also, Tokyo Convention, Convention on the Offenses and certain other Acts Committed on Board Aircraft, signed at Tokyo on 14 Sept. 1963, in 704 U.N.T.S.; The Hague Convention, Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 Dec. 1970, in 860 U.N.T.S. 105; Montreal Convention, Convention for the Suppression of the Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 Sept. 1971, 974 U.N.T.S. 177;

The provisions of the later two Conventions create ' Universal jurisdiction' on the part of the signatory states for the prosecution of the hijackers. The contracting states are obligated either to prosecute or to extradite. See arts. 5,7, and 8, Id.:

106.See U.N.C.L.O.S., Supra n, 102 at p. 34.

107.See sec. 404 of the Restatement, Supra n, 55 at p. 254.

108.See Art.3 of the Geneva Convention to Suppress the Slave Trade and Slavery, 1926, in LX L.N.T.S. 1927.

109.The Genocide Convention does not authorise state parties to try persons accused of genocide. Jurisdiction is prescribed to the state in whose territory the act was committed or by international penal tribunal. See Convention on the Prevention and Punishment of the Crime of Genocide, 1948, in 78 U.N.T.S. 277.

110.For text see, 82 U.N.T.S. 277, at p. 286 & 288.

111.Id.

112.G.A.Resl. 3074 (XXVIII), 3 Dec. 1973.

113.However,

> " in practice, the universality theory has not seen much application as a basis for extradition requests, even though it is relied upon in Nuremberg and Tokyo, but these were regarded as international rather than national tribunals."

Supra n, 49 at p. 270; Moreover, the competence of these tribunals were confined to war crimes:

114.15 I.L.M. 1272, at p. 1273.

115.For the text see, 28 U.S.T. - T.I.A.S. 8532.
And, Art. 6 of the Convention provides that;

> " state parties in whose territory the alleged offender is present shall take appropriate measure under its internal law so as to ensure his presence for the purpose of prosecution or extradition." Id., at p. 1980.

116.Though no fixed definition of the term "international criminal law" is to be found, however, Prof. Bassiouni is of the opinion that;

> " International criminal law is a product of the convergence of two different legal disciplines ... they are the criminal law aspects of international law and the international law aspects of national criminal law."

See, Characteristics of International Law Conventions, in I International Criminal Law, (ed. M.C. Bassiouni, 1986) at p. 1;

See also, L.C. Green, Supra n, 103;

Prof. L.C. Green, is of an opinion that, ' without the establishment of an International Criminal Court, there is no prospect of any universal international criminal law.' See, Is There a Universal International Law Today ?, in 23 Cdn.Ybk.Int'l.L., (1985) 3, at pp. 19-20:

117.Supra n, 49 at p. 269. Prof. Bassiouni, states that there are 22 International crimes. And the legal bases for considering these 22 categories of International crimes according to the sources of International law are;

> " (1) Existing International Conventions which consider the act in question an International crime;
> (2) Recognition under customary International law that such conduct constitutes an International crime;
> (3) Recognition under general principles of International law that such conduct is or should

> be deemed violative of International law and about which there is a pending draft convention before the United Nations; and
> (4) Prohibition of such conduct by an International Convention though not specifically stating that it constitutes an International crime and which is also recognized in the writings of the scholars as such.

See M.C. Bassiouni, I International Criminal Law, Id., at pp. 1 & 2:

118.Supra n, 49 at p. 266.

119.74 I.L.R. 166; For the discussion on ' universality jurisdiction', See also, Eichmann Case, 36 I.L.R. at pp. 289-304:

120.74 I.L.R. at p. 167.

121.Id.

122.However, it should be noted that the presence of an accused may not be necessary in those countries which permit trial in absentia.

123.However, the act should be an extraditable offense as well as fulfil the requirement of double criminality.

124.776 F.2d. 571; See also, Re Federal Republic of Germany and Rauca, 145 D.L.R. (3d.), 638.

125.See, 23 Cdn.Ybk.Int'l.L., (1985), Supra n, 116 at p. 20.

CHAPTER III

1. SUBSTANTIVE REQUIREMENTS;

The process of extradition is normally set in motion by a request from the demanding state for the arrest of the accused on an extradition warrant. However, there are certain substantive requirements of extradition which are to be met before an extradition request is granted and they are,

> " ... that a person accused of or found guilty of an offence in the requesting state be surrendered to that state provided that;
>
> 1) If there is a treaty, the offence be designated or listed;
>
> 2) If there is ~~no~~ treaty, the respective states will reciprocate;[1]
>
> 3) If there is no treaty or reciprocity but the request is based on comity, the requested state will rely on its customary practice;
>
> 3) Furthermore, in all three instances the offence must also constitute an offence in the requested state, i.e., double criminality."[2]

Extraditable offenses[3] and double criminality constitute the substantive requirements for the surrender of an individual by virtue of any one of these bases. " A corollary to these requirements of extraditable offenses and double criminality is the doctrine of speciality."[4] Nevertheless,

> " certain judgments made by the courts, give rise to the impression that to make a particular crime extraditable, it must be mentioned in the national Extradition Act."[5]

Thus, in Re Brooks, (1930),[6] where,

> " An order was made by an Extradition Commissioner, upon the application of the state of Ohio, for the

> extradition of B, to that state to answer a charge, pending against him there, of wilfully neglecting and refusing to provide for his child, a girl under the age of 16 years,"

it was held (in chambers),[7]

> " (1) That the imputed crime is a crime within the Extradition Treaty; and (2) within the Extradition Act; and (3) within the law of the state of Ohio; and (4) that there was such evidence of criminality before the learned judge as, if the crime had been committed in Canada, would, according to Canadian law, have justified the committal of the accused for trial."

Decision by the Canadian court in Re Brooks indicated that the crime in order to be extraditable should be mentioned in the extradition act. This decision was reaffirmed in United States v. Link and Green, (1954),[8] when the Superior Court of Quebec refusing the extradition request from the United States, said,

> " Before an extradition application can be granted it must be shown that the crime with which the accused is charged in the foreign country is a crime which is also punishable by the law of Canada."

But this is no longer true in respect to the recent treaties concluded between some states.[9] As, in accordance with these treaties extraditability is based on the degree of penalty provided for the offense rather than on the nature of the offense.[10] However, like all treaties they are limited to state parties to the treaty. Whereas, the Extradition Acts of Canada and the United Kingdom still require that the offence(s) for which extradition request is being made should be in accordance with the Act.[11]

1.1. EXTRADITABLE OFFENSES;

' The question whether the act also constitutes an extradition offense is considered exclusively by reference to the law of the requested state,'[12] this being of course a condition not to the presenting of the petition for extradition but for its being granted. And, one of the means of identifying extraditable offenses is by taking under consideration the substantive material criterion[13] which was reflected in Engel and Friedman v. State of Israel, (1980).[14] ' In this case the Canadian Government had requested the extradition of the appellants, who were wanted inter alia, for the offence of 'rape' which was an extraditable offence under the Extradition Agreement[15] between Canada and Israel.' Barak J., giving the decision in the name of the Supreme court in this case said,[16]

> " ... I have already said that the name by which an offence is called neither adds nor detracts.
>
> Thus, it is of no significance that the offence laid down in section 346 is termed ' rape by deception'. We are bound to interpret the Extradition Agreement in a liberal manner,[17] and to examine the offenses specified therein by means of a substantive, material criterion. Under such a criterion, the substance and import of the offence of rape is illegal sexual intercourse with a woman, without her consent. This is the essence of the offence, its substantive element and its typology. In this respect, it makes no difference which name is given to the offence in Israeli legislation, whether it is termed ' rape', ' rape by deception', ' unlawful intercourse' or any other name. If the domestic legislator makes any division into separate offenses, whether in original legislation or by way of ' New Versions' or 'Consolidated Versions', he does so as a matter of convenience, and this cannot affect the substance of the offence. We therefore reject counsel's argument ..."

On the other hand, the mere fact that the act is punishable by the law of both the states does not constitute an extraditable offence (provided that there is no arrangement to the contrary[18]), but rather it is necessary that the concrete circumstances of the act as set forth in the request for extradition, should constitute an offence. For example in Lazzeri v. Schweizersche Bundesanwaltschaft, (1961),[19] where, ' The Italian authorities requested for the extradition of the appellant who had been sentenced in absentia on May 18, 1956 to six months imprisonment for fraudulent bankruptcy and fraud. One of the arguments raised by the appellant was that the extradition proceedings leading to his conviction had been vitiated by procedural faults and therefore could not be recognized.'

The Swiss Federal Tribunal granting the extradition request said,

> " It is not sufficient, either, that the act alleged to have been committed is punishable under the law of both States concerned; it must also constitute an extraditable offence. The question whether an act constitutes an extraditable offence must be determined, not on the basis of the name given to the offence in the criminal law of the two States but by reference to the factual relationship between the national legislation of the two States and the concept of offence used in the Treaty; in other words, the divergent designation of the offence in the law of different is not a bar to extradition."[20]

The court further said,[21]

> " The Extradition Treaty between Italy and Switzerland lists ' fraudulent bankruptcy' and ' fraud' under the offenses for which extradition is granted. On the other hand, it does not list '

> suppression of documents'. This does not, however, mean that the acts now so designated by Swiss law are not extraditable. The Extradition Treaty uses the concept of ' fraudulent bankruptcy' which was current at the time of its conclusion both in Italy and in a number of Swiss cantons. This concept essentially corresponds to that of Article 216 of the Italian Bankruptcy Law of March 16, 1942. The Extradition Treaty thus embraces in the concept of ' fraudulent bankruptcy' certain acts designated by present Swiss law as ' suppression of documents'."

Thus, ' whether an act constitutes an extraditable offense or not is determined not according to the name given in the criminal law of the two States, but by reference to the factual relationship between the national legislation of the two states and the concept of the offense used in the Treaty.'[22]

Two schools of thought are found to exist in cases where treaty is regarded as the principal source, viz,

(i) Enumerative method,[23] and

(ii) Eliminative method.[24]

However, on the basis of recent extradition treaties concluded between some states[25] a third classification may be proposed, viz, " a modified method", this method tends to incorporate elements inherent in both the methods. For example, Art.2(1) of the Protocol between Canada and the United States, (1988),[26] grants extradition on the basis of the eliminative method however, Art(IV)(2) of the Protocol enumerates a list of offenses which are not to be considered as political offense. Moreover, the Extradition Act[27] of

Canada indicates adherence to both the methods, as may be observed from sec.2 of the Act which defines ' extradition crime' as,

> " ... any crime that, if committed in Canada, or Canadian jurisdiction, would be one of the crimes described in schedule I; and, in the application of this Act to the case of any extradition arrangement, extradition crime' means any crime described in such arrangement, whether or not it is comprised in that schedule;"

United Kingdom on the other hand has amended her legislation adopting the eliminative method which may be observed from the Criminal Justice Act (1988),[28] which defines 'extradition crime' as,

> (a) Conduct in the territory of a foreign state which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, is so punishable under that law;"

The defects inherent in the enumerative system for example, omission of certain offenses from the list is one of the reasons for the sudden change in the attitude of the states. Moreover, certain offenses (as example, terrorism, genocide, etc.) did not even exist when most states concluded their extradition treaties. And their subsequent inclusion by Supplementary Treaty or Amending Protocol may prove too cumbersome. This method sets a standard of severity which ensures that offenses e.g., based on twelve months imprisonment are deemed to be extraditable. This method at the same time excludes certain acts or offenses from the concept of ' political offense exception' which are not considered political, thereby limiting the application of the concept to acts or offenses of ' purely political' character.

Recent trend adopted by certain states[29] seems to be an appropriate and effective way of securing the return of an offender. According to this practice an offence is deemed to be extraditable as soon as it carries a sentence (imprisonment) of 12 months or more.

1.2. DOUBLE CRIMINALITY;

This rule ascertains whether there exists in requested state, offenses corresponding to those with which the wanted person was/is charged in the requesting state. This provision is usually expressly incorporated into the terms of treaty and national legislation. For example, the Protocol (1988),[30] between Canada and the United States contains such provision in Art.2(1); " Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both contracting Parties ..."

A provision to similar effect is to be found in the Extradition Treaty concluded between United States and Italy, (1983),[31] and the United States and U.K.,(1976).[32] The national legislation of states contains similar provisions.[33]

The concept of " double criminality" as an important rule of the law of extradition is reflected in the decisions of the courts of various states. In Austrian Extradition (No.I) case, (1953),[34] the Austrian Supreme Court denied the request by Germany for the extradition of a person as his extradition would have violated the principle of double criminality. The relevant facts of the case are as follows,

> " The Federal Republic of Germany requested the extradition from Austria of a person who had been convicted of larceny and fraud by a German court and who had subsequently escaped from prison before the expiration of his sentence. On behalf of the accused it was contended that on a proper interpretation of Austrian law he would - if tried in Austria - have been convicted of larceny only, and not larceny and fraud, and that his extradition would therefore violate the principle of double criminality."

The Austrian Supreme Court said in its judgment that;

> " According to the general rules of the international law of extradition it is a prerequisite of any extradition that the offense in respect of which extradition is required shall be an extraditable offense not only by the law of the requesting state, but also by the law of the requested state (principle of double criminality)."

The extradition of the accused was refused as the offence for which the accused had been convicted in Germany would - if tried in Austria - have been larceny only and not larceny and fraud (although both the offenses were extraditable[35]). Thus his extradition would have violated the principle of double criminality. The question of seeking assurance does not arise in this case as the accused had already been convicted and was serving his sentence. Similarly, the Quebec Superior court of Canada in United States of America v. Link and Green, (1954)[36] refused the extradition of the accused on the ground that,

> " It now becomes necessary to state that the applicant did not attempt to make any proof that

> forgery, false pretences, defrauding the public or appropriating money or property for the benefit of the accused were offenses under the law of the State of Michigan, although they are criminal offenses under the Canadian Criminal Code."

However, it is not necessary that the offenses charged should be the subject of identical criminal provisions in the states concerned.[37] ' This approach to the requirement of double criminality is based on the consideration that the criminal legislation of the various countries is not identical in every respect, so that if complete coincidence were required extradition agreements would become nugatory.'[38] Once the offense in question is punishable by the criminal laws of both states, the requirement of double criminality is deemed to be fulfilled. Thus in M v. Federal Department of Justice and Police, (1979),[39] it was held by the Swiss Federal Tribunal that,

> " By reason of its universal validity, double criminality was tacit precondition for the application of the Extradition Treaty even though it was not expressly mentioned in general form. Provided the act in question was punishable according to the criminal laws of both states it was not necessary that the facts charged were the subject of identical criminal provisions in the States concerned."

And in R v. Davidson, (1976),[40] ' The appellant was extradited from the Federal Republic of Germany to the United Kingdom in pursuance to the Treaty of Extradition, (1872) between the two countries. He was charged with being concerned in the management of a company when an undischarged bankrupt. The request for his extradition was granted on the basis that, although there existed no identical offence under German law, the facts as shown would have constituted similar offenses of fraud under German law. The appellant sought to have his indictment struck out for lack of jurisdiction.'

The appellant was convicted at the court of first instance. On appeal, the English Court of Appeal (Criminal Division), dismissed the appeal. The following is the relevant part of the judgment;[41]

> " What is the argument to the contrary ? The argument to the contrary is that when the application for extradition is made by virtue of the Treaty at present maintained between Her Majesty and the West German Government the offenses scheduled in the Treaty do not match exactly with those which are to be found in the English law. When the appropriate court in Germany was required to pronounce upon whether extradition proceedings were admissible here or not, it decided in, if I may say so with respect, a very careful judgment that the pursued's extradition to the British Government or his prosecution pursuant to the charges ..., is admissible.
>
> However the court considered that its duty under its own constitution was not to reject the application for extradition merely because there was no equivalent offence under German law, but to see whether there was any extraditable offence other than that specified in the English statute in respect of which the facts alleged against the pursued (which he is called) are sufficient to maintain an extraditable offence ... the German court says this: It is true that under German law there is no penal clause comparable to this British one. The facts on which the charges are based and which follow from the evidence at hand, can, however, under German Law, be evaluated as an extraditable offence of fraud ... The court goes on .... because the pursued is suspected of having, as one of the managers of a group of enterprises, participated in the ' cross-firing' to the detriment of the National Westminster Bank Ltd. thereby deceiving the bank on the financial situation of the enterprises managed by him for the purpose of

> obtaining excessive credits. In determining whether a person can be extradited or not, it is not the designation of the individual offence that matters, nor does it matter, especially, whether these correspond to one another under German and British Law."

Thus, the German courts looked upon the facts alleged rather than the equivalency under the German law. Decision to similar effect was delivered by the Supreme Court of Israel in Angel and Friedman v. State of Israel,(1980).[42]

Canadian practice on the other hand, seems to be different as would appear from State of Washington v. Johnson, (1988),[43] the supreme court of Canada in this case said, " the double criminality rule is conduct based."[44] The relevant facts of the case are as follows,[45]

> " Johnson offered to sell an organ for a Washington couple and was given possession of it. The organ was to be returned on the expiry of thirty days if it had not been sold. The organ was not sold nor was it returned. Respondent was arrested in Seattle, Washington, pleaded guilty to theft in second degree, and was sentenced. He escaped custody some months later and came to Canada.
>
> Authorities in the State of Washington commenced extradition proceedings pursuant to the Extradition Treaty of 1976 between Canada and the United States. He was committed for extradition. His application to the British Columbia Supreme Court was denied but the British Columbia Court of Appeal allowed his appeal."

On appeal by the state of Washington to the Supreme Court of Canada,[46]

> " The central issue ... was whether the double criminality rule requires the elements of extradition crime to be the same in the requesting and requested state or whether it merely requires the act charged to be a listed crime in both countries."

The court held,[47]

> " The appeal should be dismissed.
>
> The double criminality rule is conduct based. If it can be established that the fugitive's conduct constituted the listed offence of theft in both Canada and Washington, the double criminality requirement is met.
> Respondent was convicted in Washington of theft in second degree. This crime ..., does not include the requirement of fraudulent intent whereas theft in Canada, as defined in the criminal code, expressly contains this requirement. Accordingly, ... respondent's conduct would not constitute the offence of theft had it taken place in Canada."

The Decision of the Supreme Court indicated that one of the requirement of the rule of double criminality is the essential elements of the offense be the same in both the states.[48] However, the Canadian practice may not be the same after the Protocol. The reason being, as stated earlier Art. 2(1) of the Protocol expressly states that ' Extradition is to be granted for conduct punishable by the laws of both the States by imprisonment or other form of detention for a term exceeding one year or any greater punishment.' Thus any conduct falling within the provision of Art. 2(1) will be deemed extraditable.

The double criminality rule from the point of view of the extra-territorial application of the criminal law is explicitly embodied in the extradition treaties.[49]

1.3. DOCTRINE OF SPECIALITY:

This doctrine provides that a fugitive may not be tried in the requesting state for an offence other than the one for which the surrender is made. However, ' the requesting state is free to try the fugitive for any offence established by the facts adduced in support of the request, provided that this offense is also a treaty offense; and there is no limitation as to the nominal crime proved by the facts.'[50]

The doctrine of speciality is often mentioned in extradition treaties between states and in extradition acts. For example, the Extradition Treaty between Canada and the United States, (1976),[51] provides in Art. 12,that;

> " (1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting state for an offense other than that for which extradition has been granted ..."

Similarly, the Extradition Act of Canada contains the following in Art 33;[52]

> " Where any person accused or convicted of an extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, he is not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, subject, in contravention of any of the terms of the arrangement, to a prosecution or punishment in Canada for any other offense committed prior to his surrender, for which he should not ,under the arrangement, be prosecuted."

' This doctrine developed because extradition is subject to certain requirement, such as the type of offense for which it shall be granted as between the respective states. Without the doctrine of speciality, the surrendering state will not in effect be able to determine whether the substantive requirements of extraditable offenses and double criminality have been fulfilled.'[53] Professor S.Z. Feller is of the opinion that,[54]

> " The procedural expression of the speciality limitation is that as long as a person is present in the requesting state, in the capacity of an extradited person, i.e., against his will, he is held to be present in that state only for the purpose of the extradition which brought him there, and he is held to be absent for any other criminal matter in which he is involved."

The review of the decision of the courts of various states indicates that the doctrine of speciality has been recognized as one of the important requirement of extradition law. Thus, in Re Dilasser, (1952),[55] the Federal and cassation court of Venezuela, held that, " the revision of charges contained in the extradition must be refused."
The relevant facts of the case are, ' The Federal and Cassation court of Venezuela had authorized the extradition to France of Dilasser, a French national and Alexi Belostoski, a native of Russia. They had been charged with swindling and being an accessory thereto. The French authorities now requested the revision of the charges against Dilasser to swindling and fraud. The extradition of the accused had been granted on the basis of reciprocity, as no treaty existed between Venezuela and France.' The court said,[56]

> " Given this situation, we must now examine the principles of international law governing the subject under consideration. There is a rule, dominant in doctrine, in international practice, and as a principle vigorously defended by publicists, that a person may be tried only for the

> offence for which he was extradited unless it has been agreed otherwise ...."

Decisions to similar effect are to be found in Kuhn v. Staatsanwaltschaft Das Kantons Zurich, (1961),[57] and Extradition from Morocco Case, (1973).[58] In the former case the Federal Tribunal of Switzerland on May 12, 1961, said that,[59]

> " ... without the consent of the extraditing state an extradited person may not be interrogated, punished or re-extradited for an offence committed prior to extradition and in respect of which extradition is not granted, nor may his personal liberty be in any way restrained on other legal grounds relating to events prior to his extradition ..."

In the same way in the latter case, ' The complainant was extradited to the Federal Republic of Germany following a request to the Moroccan authorities in 1964. The request related to criminal offenses for which he was subsequently convicted and sentenced in the Federal Republic of Germany to three years imprisonment. Prior to his extradition he had been on probation and subject to a suspended sentence for a previous offense. This sentence was subsequently enforced and the complainant made to serve part of it whilst in detention awaiting trial on the offenses for which he had been extradited. He lodged a complaint against his treatment.'[60] The court said in its judgement that,[61]

> " On the basis of the principle of speciality which applies to extradition relations with Morocco, sentences for offenses other than those mentioned in the extradition request could only be enforced if the criminal proceedings related to the facts giving rise to the extradition request had been

> finally terminated and the convicted person had been given the possibility to leave the territory of the Federal Republic for thirty days following his release. However, the conditional suspension of the remainder of the sentence handed down in the conviction by the court of M. did not constitute such a final release because the complainant remained subject to restrictions with regard to his place of residence ... This is for the reason that in such a case the opportunity for the German authorities to apprehend the complainant is no longer dependent upon his extradition (for another offence) but on his having returned of his own free will."

Thus, it was held that the enforcement of the suspended sentence had been inadmissible.And, in Oskar v. Government of the Commonwealth of Australia, (1988),[62]

> " The applicant was convicted of various offenses and sentenced to two years imprisonment by the Crown Court. A charge of perjury in relation to English bankruptcy proceedings was ordered to lie on the file, not to be proceeded with without leave of the court. In september 1985 a requisition was served on the Secretary of State by the Australian government requesting applicant's return to Australia to face charges of perjury alleged to have been committed in court proceedings in Australia in 1983 ... In September 1985, the secretary of state issued an authority to proceed ... In November the applicant was released from prison but he was immediately re-arrested and committed in custody to wait his return to Australia."

The applicant applied for a writ of habeas corpus and one of his grounds was, that,[63] " ... having regard to the passage of time since the offence was alleged to have been committed in Australia, it would be unjust or oppressive to order his return."

The Divisional Court dismissed the appeal, on further appeal it was held by the House of Lords, that,[64]

> " (3) ... any question as to whether the time spent in custody from the defendant's re-arrest until any conviction in Australia would represent in itself a sufficient sentence of imprisonment was a matter for the Australian courts alone and that the period of time which had elapsed since the commission of the alleged offence in Australia did not make it unjust or oppressive, having regard to all the circumstances, to return him there for trial.
>
> Decision of the Divisional court of the Queen's Bench Division affirmed."

And the appeal was dismissed. The English courts in this case ruled that the question, whether, the arrest of the accused and the time he spent in custody in the requested state constituted a sufficient sentence of imprisonment was a matter to be decided by the courts of the requesting state.

Doctrine of speciality as one of the important doctrines of extradition law is amply supported by the above mentioned decisions. The Restatement,[65] on the other hand provides in Section 477 that

> " Under most international agreements, state laws and state practice;
>
> (1) A person who has been extradited to another state will not unless the requested state consents,
>
> (a) be tried by the requesting state for an offense other than one for which he was extradited;"

The rationale for the doctrine of speciality rests on the following factors,[66]

> " (1) The requested state would have refused extradition if it knew that the relator would be prosecuted or punished for an offence other than the one for which it granted extradition.
>
> (2) The requesting state did not have in personam jurisdiction over the relator, if not for the requested state's surrender of that person;

> (3) The requesting state could not have prosecuted the offender, other than in absentia,[67] nor could it punish him or her without securing that person's surrender from the requested state.
>
> (4) The requested state will be using its processes in reliance upon the representations made by the requesting state."

However there are certain limitations to this doctrine, viz,

(1) If the treaty expressly provides that the person surrendered may be tried or punished for another offense if the surrendering state consents thereto. For example Art 1(2) of the Supplementary Convention on Extradition,(1882),[68] between Belgium and Switzerland, provides,

> " An extradited person shall not be prosecuted and sentenced for a crime or misdemeanour provided for by the Convention, committed prior to extradition other than that which grounded the extradition, without the consent of the government which surrendered the extradited person; ..."

Similarly Art.6 paragraph(1) of the Extradition Treaty of (1896)[69] between Germany and the Netherlands provides that;

> " The extradited person must not be subjected to trial or sentenced in the country to which he was extradited for a criminal offence committed prior to the extradition other than the one forming the ground for the extradition, without the consent of the Government granting the extradition."

Provision to this effect is also found in the Restatement[70] and the Criminal Justice Act,(1988),[71] of the United Kingdom.

(ii) Another exception to this doctrine is if the extradited person voluntarily consents to be tried for other offenses or if such person, voluntarily returns to the state seeking that person's extradition. Thus, in The King v. Corrigan, (1930),[72] where,

> " The appellant was brought before a tribunal in France on a claim for his extradition on a charge of false pretences. He waived all the formalities of extradition and was handed over to the English police. He was convicted in England on a charge of fraudulent conversion based upon the facts contained in the information upon which the claim for extradition was made."

' Corrigan appealed his conviction, his argument was based upon S.19 of the Extradition Act (1870) and Art IV of the Extradition Treaty with France (1876),[73] both of which provided that a person surrendered shall not be tried for any crime or offence other than the crime for which his surrender has been granted.'[74] The court rejected the appellant's argument, saying that,[75]

> " ... the majority of the court is not satisfied that in this case there was in fact any extradition or surrender at all. The facts are a little difficult to ascertain, and indeed even now what really happened is not quite clear... In considering what the facts are, and what they amount to in point of law, it must always be borne in mind that the burden of proving such facts as will establish his contention in law rests upon the accused... and if he desired to prevent the court from proceeding to his trial, the burden was upon him to show beyond reasonable doubt that such fact existed as would render his trial by the law of England illegal and improper. In view of the learned Commissioner he failed to prove this."

And in the case of Regina v. Gagnon, (1956),[76] it was held by the Quebec court of Sessions of the Peace (Canada) that,

> " The accused was not entitled to the benefit of S.33 of the Extradition Act. An accused could not avail himself of the privileges of S.33. of the Extradition Act if he had not been brought back to Canada in pursuance of an extradition arrangement

> between Canada and the state from which he had been returned."

The court said that,[77]

> " The principle enunciated in S.33, which has been adopted by every nation having conventions or treaties of extradition, dates back to the English Extradition Act of 1870. It is therein provided, ... that a surrendered criminal shall not be tried for any but the crime for which he is extradited. But, before S.33 can be applied, the extradition must be made in pursuance of an extradition arrangement. This appears to be also a condition sine qua non."

In a recent case R. v. Parisien, (1988),[78] the Supreme Court of Canada rendered a decision upholding the limitation to the doctrine of speciality. Facts of the case are as follows;

> " Appellant a Canadian citizen, was arrested in Brazil after a warrant for arrest on a charge of fraud had been laid against him in Canada. There was no extradition treaty between Canada and Brazil, but an arrangement was entered into by the two countries which provided in particular that no surrender should take place unless the requesting state agreed that the person surrendered would not be imprisoned nor tried for other acts which occurred before the extradition request.
>
> Appellant was surrendered to Canada in respect of five counts of fraud and was tried and sentenced. At the expiry of the sentence, Crown counsel notified appellant that further charges for offenses committed prior to his extradition would be proceeded with. On appellant's return to Canada from a visit to Portugal, a new information was sworn charging him with thirty nine offenses.
>
> At the preliminary hearing, the Provincial Court Judge dismissed a motion for a stay of proceedings holding that the prosecution was not contrary to Canada's undertaking to Brazil. An application for prohibition and an order to quash the proceedings were dismissed by the Supreme Court of Ontario. Appellant's appeal to the court of Appeal was dismissed and leave to appeal to this court was granted."

It was held by the court that,[79]

> " The appeal should be dismissed. Canada's undertaking does not give appellant immunity after he has had a reasonable opportunity to return to Brazil ..."

La Forest J. delivering the judgement for the Supreme court said,[80]

> " Does Canada's undertaking,then, give to appellant immunity even after he has had a reasonable opportunity to return to Brazil? In interpreting this undertaking, it must, as in the case of other terms in international agreements, be read in context and in light of its object and purpose as well as in light of the general principles of international law; ... when the arrangement was entered into, the appellant was in Brazil to which he owed local allegiance, and Brazil in turn owed him the correlative duty of protection.In surrendering a person under its protection, Brazil would have an interest in seeing that the surrender was not used for a purpose other than that for which it was made. The appellant, however, remains in the country no longer as a result of the surrender, but because he chooses to live here. This is not surprising; he is a Canadian citizen. As such, he is entitled to the protection of our laws , but both as a citizen and a resident, he owes allegiance to Canada and is subject to its laws. Brazil exercised its duty of protection by securing the appellant against prosecutions for crimes other than those for which he was surrendered. But once the appellant is no longer here because of the surrender but rather because he seeks of his own accord to live in Canada and to enjoy the protection of our laws, he owes a duty of allegiance to Canada and is subject to those laws. There can be no doubt, of course, that the appellant in this case chose to stay in Canada. He was actually out of the country for a time and returned here despite the earlier warning that he would be prosecuted for the offenses for which he is now charged."

Thus, if a person stays in a country of his own free will or subsequently returns after having left that country which had in fact sought his extradition tried and prosecuted him, he or she may be tried for other offenses committed prior to his or her extradition having been sought. And the rule of speciality is no longer applied in such circumstances.[81] The Swiss courts have rendered a similar decision.[82]

The doctrine of speciality finds specific mention in Sec. 33 of the Canadian Extradition Act, and has been maintained in the Protocol between Canada and the United States, (1988). One of the fundamental changes made by the Protocol is in respect to ' extraditable crimes' as the amended provision of Art. (2) deletes the ' schedules' of the treaty, which contained a list of extraditable crimes. At first glance, the amended provision of Art. (2) seems to be affecting the doctrine of speciality as according to the amended version of the above mentioned article, the only requirement for an offence to be extraditable is that ' it should be punishable by the laws of both Contracting Parties by a term of imprisonment or detention exceeding one year or more.' However, this is not the case as the requesting state while making request for extradition still has to observe the formalities mentioned in Art.(9) of the Treaty, sub - article (2) of which states,[83]

> " The request shall be accompanied by a description of the person sought, a statements of the facts of the case, the text of the laws of the requesting state describing the offense ..."

or in other words, the request for extradition should indicate amongst other requirements the offense for which the accused is charged or convicted.[84] This provision allows the accused to invoke sec. 33 of the Act,[85] if the accused is tried or proceeded against - for an offense other than that for which extradition was granted.

Thus it may be argued that substantive requirement plays an important part in the law of extradition, as an offence in order to be extraditable should fulfil these requirements. And, once extradition is granted, the surrendered person is protected by the rule of speciality. However, the recent treaties concluded between some states[86] indicate a change from their earlier practice. For example, the recent practice has been to omit the list of extraditable offenses thus basing extradition upon the sentence (imprisonment) to be imposed. Similarly, on the other hand these treaties list certain offenses that are not to be considered as political offenses.[87]

NOTES;

1.The Canadian practice however is different as the Canadian Extradition Act may operate even in an absence of an extradition treaty. See Chapter II at p. 41.

2.M.C. Bassiouni, International Extradition And World Public Order, (1974), at pp. 312-313.

3.The recent trend adopted by some states (viz., United States, Canada, United Kingdom, and Italy), while concluding extradition treaties has been to rely upon the duration of the sentence (imprisonment) to be imposed in both the states, rather than enumerate the extraditable offenses; For example see, Art. 2(1) of the Protocol Amending the Treaty on Extradition (1988), [hereinafter referred to as the Protocol] where it is provided that,

> " Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment."

in 27 I.L.M. 422, at p. 423; See also, Art.III (1)(a) of the Extradition Treaty between United States and the United Kingdom (1976) in 28 U.S.T.-T.I.A.S. 8468; Art.II (1) of the Extradition Treaty between United States and Italy, (1985) in 24 I.L.M. 1527, at p. 1527:

4.Supra n, 2 at pp. 312-313.
As the rule of "Speciality" ascertains that the person surrendered shall not be tried or punished for any other offense than the one for which his/her surrender was made.

5.S.D. Bedi, Extradition in International Law And Practice, (1966), at p. 62.

6.66 O.L.R. 158.

7.Id., at p. 162.

8.[1955] 3 D.L.R. 386; See also, Chapter II at p. 50.
However, the Canadian practice at present with respect to the United States is different because of the recent Protocol (1988), see, Art. 2(1), Supra n, 3.

9.Supra n, 3.

10.Id.

11.For example see, Part I Section 4 of the Criminal Justice Act 1988 of the United Kingdom whereby it is provided that,

> " There shall be furnished with any such request
>
> (a) Particulars of the person whose return is requested,
>
> (b) Particulars of the offence of which he is accused or was convicted (including information sufficient to justify the issue of a warrant for his arrest under this part of this Act.
>
> (5) On the receipt of any such request the Secretary of State may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Part of this Act."

Thus, in England, an offence in order to be extraditable should fall within both the Treaty and the Act; See also, Re Arton; [1895] 1 Q.B. 108, at p. 112; As for Canada see, Art. 18 of the Extradition Act, R.S.C. 1970, c.E-21; As for Australia, see Brown v. Lizars 1905, 2 C.L.R. 837:

12.See, M.C. Bassiouni, Two Models of Extradition in Law and Practice, in II A Treatise on International Criminal Law, (ed. M.C. Bassiouni and V.P. Nanda, 1973) at p. 358.

13.By substantive material criterion is meant the indication of a crime by its substance (which means the necessary and sufficient content of the offence) rather than its typology (the various forms of offense) or the conceptual (the offense in its concise, basic sense, i.e. the internal division of each class of offense) category.

14.34 P.D. 98, cited in S.Z. Feller, Some New Emphases in Extradition Case Law, in 16 Is.L.R., (1981), at pp. 208-214.

15.Item 6 of the schedule to sec. 1, in C.T.S., (1969), No. 25.

16.Supra n, 14.

17.See also, Factor v. Laubenheimer (1933). In this case, the British Government had requested extradition of Factor on a charge of receiving money, knowing that it had been fraudulently obtained. The criminal law of Illinois, where Factor was found, did not cover such an offense. However, it was held by the United Supreme Court that he was extraditable. The court said,

> " The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships ... should be construed more liberally than a criminal statute or the technical requirements of criminal procedure ...."

In 290 U.S. 276, at p. 298.
La Forest is of the opinion that,

> " In construing extradition treaties and statutes, it is a well established rule that courts should give them a fair and liberal interpretation with a view to fulfilling Canada's international obligations."

See G.V. La Forest, Extradition To and From Canada, (1977), at p. 22, see also the cases cited therein.

18.For example see, Supra n, 3.

19.34 I.L.R. 134.

20.Id., at p. 136.

21.Id.

22.Id.; In R. v. Dix, Darling J., was of the opinion that,

> " ... the essential thing was to see whether what the evidence showed prima facie that the prisoner had done was a crime in both countries and within the treaty ... it was not in his opinion essential that the offence should be called by the same name in both countries."

See, 18 T.L.R. [1902] 231, at p. 232.

However, in U.S. v. Eisler (1948), where United States had requested the extradition of Eisler for the conviction on a charge of perjury, the British Magistrate denied the request. Thus discharging Eisler from custody, the Magistrate held that,
" It is abundantly clear that in no circumstances whatever could the offence of which he was convicted in America come under the technical head of perjury in this country." Since the false statements were made in an administrative and not a judicial proceeding; See George A. Finch, The Eisler Extradition Case, 43 Am.J.Int'l.L. (1949) 487, at p. 488; See also, Phillip E. Jacob, International Extradition: Implications of the Eisler Case, 59 Yale Law Journal (1950) 622:
And, V.E. Hartely Booth is of the opinion that, " British courts frequently take notice of an offence or legal term of a foreign state which amounts to similar or the same offence or term in British law." See, British Extradition Law and Procedure, (1980) at p. 49.
As for the United States, see Wright v. Henkel (1903), where it was said, " it is enough if the particular variety was

criminal in both jurisdictions ...", 190 U.S. 40, at pp. 60-61; See also, Kelly v. Griffin (1916), 241 U.S. 6, at p. 14; Greene, et al v. United States (1907), 154 Fed. 401; Collins v. Loisel (1922), 259 U.S. 309:

23.See, Chapter II at pp. 42-43.

24.Id.

25.Example, Protocol, (1988), between Canada and the United States, Supra n, 3; Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Acts of Terrorism, between United States and the United Kingdom, in (1985) 24 I.L.M. 1105, at pp. 1105-1107, [hereinafter referred to as the Supplement Treaty].

26.Protocol, Id.

27.R.S.C. 1970, c.E-21.

28.See, provisions of Part I, sec. 5(a) of the Criminal Justice Act, (1988) of the United Kingdom.

29.Supra n, 25.

30.Id.

31.(1985) 24 I.L.M. 1527.

32.28 U.S.T.-T.I.A.S. 8468.

33.Supra n, 27-28.

34.20 I.L.R. 365.

35.See the Austrian Extradition (No.2) Case, (1953) 20 I.L.R. 364, at pp. 364-365.

36.[1955] 3 D.L.R. 386, at p. 392. For the facts of the case, see, Chapter II, at p. 50.

37.Moreover, extradition may be granted in the absence of any corresponding offence. See S.Z. Feller, The Significance of the Requirement of Double Criminality in the Law of Extradition, in 10 Is.L.R. 51, at p. 55.

38.S.Z. Feller, Id., at p. 56.

39.75 I.L.R. 108.

40.64 Criminal Appeal Reports 209, at p. 210.

41.Id., at pp. 211-212. However in the above mentioned case of R v. Davidson, it is surprising that the English court entertained the appellant's contention (though, the accused may always argue that the treaty does not apply or does not include that offense), as normally it is for the state concerned to question the application of the treaty and not for an individual.

42.Supra n, 14.

43.[1988] 1 S.C.R. 327.

44.The court by the term "conduct based" meant that it should be established that the fugitives conduct constituted the listed offence in the requested and the requesting state.

45.Supra n, 43 at pp. 327-328.

46.Id., at p. 339.

47.Id., at pp. 341-343.

48.However in United States,

> " Since most crimes are defined and made punishable under State law, when the United States is the requested State the double criminality rule is generally applied by reference to the law of the State where the person is found. However extradition may be granted even if the act is not a crime under the law of that State, if it is a crime under the law of many States or under federal law and is covered by the extradition treaty." See Reporters' Notes and the cases cited therein, in The American Law Institute, Restatement of the Law, The Foreign Relations Law of The United States, (1987), at p. 573. [Hereinafter cited as the Restatement].

49.See Art.III of The Extradition Convention (1962) between Israel and the United States, which reads;

> " When the offence has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances."

484 U.N.T.S. 283; The following treaties lay down similar rule; Art.2(2) of the Organization of American States: Inter-American Convention on Extradition (1981), 20 I.L.M. (1981) 723; Art.III of the Extradition Treaty between Italy and the United States (1983), 24 I.L.M. (1985) 1527; Art.III (2) of the Protocol, between Canada and the United States (1988), 27 I.L.M. (1988) 422:

50.I.A. Shearer, Extradition in International Law, (1971), at p. 146.

51.C.T.S. (1976) No.3; See also, Art.XII of the Extradition Treaty between United Kingdom and the United States (1976), in 28 U.S.T.-T.I.A.S. 8468; Art. XVI of the Extradition Treaty between Italy and United States (1983), in (1985) 24 I.L.M. 1527.

52.R.S.C. 1970, c.E.-21.

53.Supra n, 2 at p. 354.

54.The Law of Extradition, (Jerusalem 1980), at 315; See also, S.Z. Feller, Reflections on the Nature of the Speciality Principle in Extradition Relations, in 12 Is.L.R. 446.

55.18 I.L.R. 377.

56.Id.

57.34 I.L.R. 132.

58.73 I.L.R. 659.

59.Supra n, 57.

60.Supra n, 58.

61.Id. at p. 660.

62.[1988] 2 W.L.R. 82 (H.L.(E.)).

63.Id., at p. 83.

64.Id.

65.Restatement, Supra n, 48 at p. 578.

66.Supra n, 2 at p. 353.

67.For discussion in "Trial in absentia" see Chapter IV, at pp. 157-163.

68.160 C.T.S. 426.

69.184 C.T.S. 89.

70.However the Restatement in its comment states that,

> " a person extradited to one state may not be extradited or otherwise surrendered to a third state

> for prosecution for an act committed prior to his extradition, without the consent of the original extraditing state." See the Restatement, Supra n, 48 at p. 580.

71.Supra n, 28; For example, the Criminal Justice Act provides in section 16 (1)(c) that,

> " 16(1) where any person is returned to the United Kingdom by a foreign state in pursuance of general or special arrangements, he shall not, ...be triable or tried for any offence committed prior to surrender in any part of the United Kingdom, other than --
>
> (c) any other offence in respect of which the foreign state may consent to his being tried."

72.[1931] 1 K.B. 527.

73.151 C.T.S. 35, at p. 41.

74.Supra n, 72.

75.Id., at p. 533; See also, R. v. Liberty [1930] 1 D.L.R. 892.

76.23 I.L.R. 405.

77.Id., at p. 409.

78.[1988] 1 S.C.R. 950.

79.Id., at p. 951.

80.Id., at pp. 958-959.

81.For example, see also Section 477(2) of the Restatement,

> " A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state."

Supra n, 48 at p. 578.

82.In the case of Kuhn v. Staatsanwaltschaft Das Kantons Zurich (1961), the Federal Tribunal of Switzerland said,

> " ... If the extradited person remains on the territory of the state to which he was extradited ... after the termination of the proceedings resulting from extradition or, in the event of conviction and sentence to imprisonment ... after release, although he might have left the country; this exception also ceases to apply if he returns

> to the country after having left it, or if her is again extradited."

See, 34 I.L.R. 132.

83.C.T.S. (1976) No.3;

> Whereas Art. 12 of the Treaty provides,
>
> " 1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted nor be extradited by that State to a third State unless:
>
> (i) He has left the territory of the requesting State after his extradition and has voluntarily returned to it;
>
> (ii) He has not left the territory of the requesting State within thirty days after being free to do so; or
>
> (iii) The requested State has consented to his detention, trial, punishment for an offense other than that for which extradition was granted or to his extradition to a third State...
>
> (2) The foregoing shall not apply to offenses committed after the extradition.

84.As normally, the requested state examines the criminality of the act from the charges laid down in the statement of facts annexed with the petition for extradition. See, S.Z. Feller, Supra n, 37 at p. 65.

85.Sec. 33 of the Act contains,

> " Where any person accused, or convicted of an extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, he is not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, subject, in contravention of any of the terms of the arrangement, to a prosecution or punishment in Canada for any other offense committed prior to his surrender for which he should not, under the arrangement, be prosecuted."

In R.S.C. 1970, c.E.-21.

86.Supra n, 3.

87.See Chapter IV under the heading " Political Offenses" at pp. 143-44.

CHAPTER IV

1. DENIAL OF EXTRADITION

Apart from the substantive requirements mentioned earlier, there are certain other exceptions in extradition law. These exceptions ' arise out of a treaty or customary practice,'[1] and are based on ' considerations of law, humanity, policy and convenience and give the requested state the right to decline extradition of the person claimed if he/she comes within the jurisdiction of those exceptions.'[2] The exceptions as such may be classified as,[3]

1.1 Grounds Relating to the Offense Charged;
   a. Political;
   b. Military; and
   c. Fiscal:
2. Ground Relating to the Relator;
   a. Nationals:
3. Grounds Relating to the Prosecution of the offense charged;
   a. Trial in absentia;
   b. Statute of limitation:
4. Grounds Relating to the Penalty and Punishability of the Relator;
   a. Amnesty and Pardon;
   b. Double Jeopardy (Ne Bis in idem); and
   c. Death Penalty:

1.1. GROUNDS RELATING TO THE OFFENSE CHARGED;

a. POLITICAL OFFENSE;[4]

During the early periods extradition was one of the means of surrendering political offenders, and the treaties expressly provided for the surrender of such offenders.[5] However, the situation is different now as the political offense exception is a standard clause in extradition laws[6] and treaties.[7] For example the Extradition Treaty between Canada and the United States (1976), in its Article 4, 1(iii), provides,[8] " that extradition shall not be granted ... when the offense in respect of which extradition is requested is of a political character ..."
Similar provisions are found in the extradition treaties concluded between various states.[9]

The concept of " political offense" as an exception to extradition has confronted the ' international community with the fact that political asylum is abused by persons who having committed the most serious crimes, may benefit from criminal immunity resulting from their being granted asylum, merely because their acts were politically motivated.'[10] The growing acts of ' international terrorism'[11] and the concept of 'related political offense' has the states thinking,

> " Whether they should restrict political asylum by formulating exceptions to the political exception, thus depriving the individual of a fundamental protection which has always been considered as being inherent to democracy."[12]

Thus, the recent tendency of some states[13] when concluding extradition treaties has been to specify crimes/offenses which are not to be considered as political, thereby confining the exception to purely political offenses or those not considered terrorist even if otherwise purely political. However, before entering into discussion as to the recent trend adopted by some states whilst concluding extradition treaties, a brief observation of the classification given to the concept of political offence would be helpful. In a broader sense the concept may be classified as,

(i) Purely political offense; and

(ii) Related Political offense:

i. PURELY POLITICAL OFFENSE;

Purely political offense has been defined by Professor Bassiouni as follows,[14]

> " A purely political offense is one whereby the conduct of the actor manifests an exercise in freedom of thought, expression and belief (by words, symbolic acts or writings not inciting to violence), freedom of association and religious practice which are in violation of law designed to prohibit such conduct."

This definition by Professor Bassiouni tends to discard the principles as enunciated in Castioni[15] and Meunier,[16] as any act or offence accompanied by the commission of common crimes does not find any room to operate within the scope of his definition. If purely political offenses are to be defined in accordance with the above mentioned definition, they can be easily dealt within extradition law as they will not meet the requirement of double criminality. For example, sedition, espionage, treason are considered to be purely political offenses[17] and thus non-extraditable.[18] This definition is in line with the recent extradition treaties concluded between United States - Canada,[19] and United States - United Kingdom,[20] as these treaties have virtually limited the application of the political offence exception to offenses of a relative political character.[21] Whereas Professor Wijngaert is of the opinion,[22]

> " Purely political offenses are characterized by two interdependent factors:
>
> (a) They are exclusively directed against the state or the political organization without injuring private persons, property or interests; and
>
> (b) They are not accompanied by the commission of common crimes,"

Thus, in Re Giovanni Gatti (1947);[23] Gatti, wanted for attempted killing of a communist party member by San Marino, pleaded his offense was of a political nature, and could not be extradited according to the French law of 10 March, 1927. The Chambre des Mises en Accusation rejected the plea, saying that,

> " Political offenses are those which injure the political organism, which are directed against the constitution of the Government and against sovereignty, which trouble the order established by the fundamental laws of the state and disturb the distribution of powers. Acts which aim at overthrowing or modifying the organisation of the main organs of the state, or at destroying, weakening or bringing into disrepute one of these authorities, or at exercising illegitimate pressure on the play of their mechanism or on their general direction of the state, or which aim at changing

> the social conditions created for individuals by the constitution in one or all its elements, are also political offenses. In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense. The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures. The reasons on which non - extradition is based do not permit the taking into account of mere motives for the purpose of attributing to a common crime the character of a political offense."

Thus " French courts viewed political as connected with anti governmental or unconstitutional activity,"[24] thereby limiting the political offence exception to acts or offenses of purely political character.[25]

ii. RELATIVE POLITICAL OFFENSE;

> " A relative political offense is one which, while having the characteristics of a common offense, acquires a political character by virtue of the motive inspiring it, or the purpose for which or the circumstances in which it has been committed; in other words, it is in itself a common offense but has a predominantly political character."[26]

This definition of ' Relative Political offense', is a relatively new concept introduced by the Federal Tribunal of Switzerland in Re Ficorilli (1951).[27] The problem raised by this particular concept as aptly stated by Lora Deere,[28]

> " ... for when we have something which is neither wholly political, nor yet wholly a crime, the uncertainty arises as to what constitutes a relative political offense, which affects the extradition process in as much as the rule has grown up that

political offenders shall not be extradited."

It is true, that it is uncertain as to what constitutes a relative political offense as according to the decision of the Federal Tribunal in Ficorilli, a common offense having a predominantly political character is said to be a relative political offense. The principle considered to be determining the predominantly political character of an offense however, was stated in the case of V.P.Wassilieff (1908),[29] by the Federal Tribunal of Switzerland as,

> " 1) the offense must have been committed for the purpose of helping or insuring the success of a purely political offense;
>
> 2) In the second place, there must be a direct connection between the crime committed and the purpose pursued by a party to modify the political or social organization of the nation. The act must be a means really efficacious to attain the political end, or at least be an integral part of acts suited to lead to this end, and
>
> 3) Finally, the common law element may predominate by reason of the atrocity of the means employed."

The definition or the means to ascertain whether an act is political or not as defined by the Swiss court is complex indeed. Nevertheless, the judgement as to the ' degree of closeness between the common crime and political objective is subject to the interpretation of the domestic courts of each nation.'[30]

Thus, in Re García Zepeda (1955),[31] where,

> " Guatemala had requested from Chile the extradition of García Zepeda, a Guatemalan national, on a charge of murder. It was contended that the accused had shot a captain while the latter was a prisoner in his custody during a political uprising in the

> capital city. According to the Guatemalan request, the offense was a common crime, punishable in Chilean law, and the charge was not void by the lapse of time. It was argued on behalf of García Zepeda that extradition should be refused on the grounds, inter alia that, the accused was charged with a political offense for which extradition may not be granted ..."

The Supreme Court of Chile, on April 14, 1955 held,[32]

> " Extradition must be refused. Extradition could not be granted for an offense characterized by both political and common crime element,"

the court further said;[33]

> " ... Given the facts under consideration, the conclusion cannot be avoided that the death of Captain Archila, which is described as 'murder' in the extradition request, involves both political and common crime elements, and that this act was closely tied to political objectives, notwithstanding the fact that by its intrinsic nature it could be regarded as a common crime."

The Supreme Court of Chile thus, denied the extradition request on the basis of the connection between the act and the objective. However, it is difficult to say that other countries would have decided the case in the same way as different countries apply different tests when assessing the political nature of an act(s).

1.2. DIFFERENT APPROACH ADOPTED BY STATES TO THE OFFENCE OF A POLITICAL CHARACTER;

i. Objective Test,

ii. Predominance Test, and

iii. Incidence Test.

i. **Objective Test**;[34] The French courts apply this test according to which an offense derives its character not from the motive of the accused but rather from the nature of the rights it injures.[35] This view is clearly evident from the French Law of March 10, 1927,[36] which provides in Art. 5(2) that;

> " Extradition is not granted; ...
>
> (2) When the crime or the offence has a political character or when it is clear from the circumstances that the extradition is requested for a political end. As to acts committed in the course of an insurrection or a civil war by one or other of the parties engaged in the conflict and for furtherance of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism ...."

The practice adopted by the French courts became known as the ' objective test'. The French courts applying this test limit the political offense exception to purely political crimes. But, the utility of this test was short-lived as the French courts have abandoned this approach and adopted the test which resembles the one used by Swiss courts, i.e., the ' predominance test', discussed below. The recent practice adopted by France however, is different and has been dealt within the later part of this thesis.[37]

ii. **Predominance Test**; This test is applied by Swiss courts while assessing the political offense exception, and

> " is based on a disassociation of the political and the common elements contained in related political crimes. Both elements are balanced against each other and the overall crime will only qualify for

> the political offence exception if it is predominantly political i.e., if the political elements supersedes the common element."[38]

The Swiss courts deny extradition when the political elements outweigh or ' predominate' over the common elements of a crime. And Thomas E. Carbonneau comments that,[39]

> " The Swiss approach is based on their extradition statute which states;
>
> Extradition is not granted for political offenses. It is granted however, even when the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offense. The Federal Tribunal decides liberally in each particular instance upon the character of the infraction according to the facts of the case."

The decisions rendered by the Swiss Courts in the case of Re Ficorilli[40] and V.P. Wassilieff,[41] mentioned earlier confirm the above statement. The Swiss predominance test encompasses both the ' pure' and ' relative' political offenses under the political offense exception.

The French courts contrary to their earlier practices, applied this test in In re Rodriguez, (1953)[42] where,

> " the Spanish Government requested the extradition from France of two of its nationals who allegedly had committed a variety of serious crimes in Spain, including arson and murder. The accused, however, contended that the Spanish Government had fabricated those charges in order to prosecute them for their opposition to the Franco regime. In reaching its decision to deny extradition, the cour d' appel of Paris relied heavily upon evidence indicating that both men were part of organized movements seeking to overthrow the Spanish regime. The court concluded that the crimes for which extradition was sought were ' at least relative political offenses' and denied extradition request."

' The court in this case, weighed the political aspects of the charge against their common elements to arrive at an assessment of their predominant character.'[43] Decisions to similar effect were rendered in In re Hennin,[44] and the case of Astudillo Calleja.[45] These cases indicate the abandonment of the objective test by the French courts.[46]

iii. **Incidence Test**;[47] This test is applied by Anglo-American courts based upon the principles enunciated in Re Castioni (1891).[48] Castioni had been arrested in England upon request of the Swiss government, accused of a murder. The English court in this case decided that the accused could not be surrendered as the offense was of a political character. Denman J., was of the view that;[49]

> " I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State ...."

Similarly, a few years later in the case of Re Meunier, (1894),[50] Cave J., defined political offence as;[51]

> " It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not."

The act for which Meunier had been charged was considered to be that of an anarchist[52] therefore not a political offense, since anarchists were considered to be opposed to all governments. And his application for the writ of habeas corpus was refused.[53]

The concept enunciated in Castioni has become generally accepted in the Commonwealth countries and the United States and was applied by an American Court in Re Ezeta[54] in 1894. In this case, ' Ezeta faced murder and robbery charges in Salvador. The Salvadoran Government had requested the extradition of Ezeta. The District Court judge Morrow giving the judgement said,[55]

> " The acts and motives of the accused in the case now before me are certainly as closely identified with the acts of political uprising, in an unsuccessful effort to suppress it, ... it shows that the offense was directly connected with the conflict then raging between the army under Ezeta and the revolutionary forces. It must be remembered that a state of siege was prevailing in the Republic ... conceding all this, the execution took place at the close of an important battle, and was undoubtedly connected with the turbulent condition of affairs prevailing at Coatepeque at that time, and was therefore of a political character."

Thus, extradition of Ezeta was refused on political grounds. It was stated in the judgement that ' the defendant had acted in support of a contending faction during a rebellion.'[56] And in Re Gonzalez, (1963),[57] District court judge Tyler said,[58]

> " The conception of political offense, in the context of extradition, is a familiar one. Both the English and American cases dealing with this issue recognize the leading case to be In re Castioni."

The court considered that the charge of murder against Gonzalez was not political and thus extraditable.[59]

Thus relying on Castioni, the American Courts have established the following requirements for the political offense exception,

' (1) the existence of a political uprising or a political disturbance;

(2) the accused must be a member of the group participating in the uprising, and

(3) acts incidental to or in furtherance of the political disturbance,'[60]

and applying these principles, the American courts in recent cases[61] have contemplated whether the political offense exception protects alleged terrorist acts. For example in Eain v. Wilkes, (1981)[62] where, ' Eain was accused by the Israeli government of exploding a bomb in the Israeli city of Tiberias which killed two young boys. Israel therefore requested Eain's extradition from the United States. Eain challenged the extradition request on the basis of political exception.' The court rejected Eain's request but it imposed certain limitations upon the principles enunciated in Castioni as is observed from the following part of the judgement. Harlington Wood, Jr., circuit judge granting the extradition request said,[63]

> " The definition of ' political disturbance', with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a state, and not

> the social structure that established the government. The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the preparatory, a political organization's political goals and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as protected political act even when the larger ' political' objective of the person who sets off the bomb maybe to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce ... We likewise conclude ... that the alleged bombing directed at the civilian population was not incidental to political upheaval ..."

Taking into consideration the decision rendered in Eain, the court is seen to have made distinction of the act i.e., whether political or non political on the basis of the target involved. The court thus, defined political offenses as those acts disrupting the political structure of the state and not the social structure.[64] This distinction hardly makes any sense as most revolutions disrupt the social structure of a state which needs no explanation. It should however, be noted that the court in this case was trying to draw a distinction between organized forms of aggression such as war, rebellion and revolution,[65] and acts of terrorism. It is true that terrorists acting individually or in group(s) belonging to one organization or the other, their acts are more or less directed towards upsetting the social structure rather than the political structure though their objective may be motivated by political ends.[66]

However, the decision rendered by the court in Eain does not adequately reflect its intentions as to what it was trying to say. Thus, an important question that may be asked is, whether it is reasonable to apply the principles enunciated in the nineteenth century in Castioni and Meunier to ascertain the political character of an act in today's world of growing terrorism ? The answer is obviously " no" as the definitions in Castioni and Meunier were adopted in an era of general liberal democracy, based on rival organised political parties, which is not appropriate in dealing with the problems of terrorism.[67]

However, the court in Eain, extending the principles enunciated in Castioni decided that as the act of bombing was directed towards the civilian population it was not incidental to political upheaval. The court in this case failed to take judicial notice of the fact that there is now and has existed for some time a military and political conflict between several Arab states and the people of Palestine and the government of Israel.[68] Furthermore the court in this case, stated that in determining a question of political offense to be incidental to a disturbance, a direct link must exist between the preparatory, a political organization's political goals and the specific act. This case prompted the United Nations General Assembly to adopt a resolution deploring the action of the United States for extraditing Eain to Israel.[69]

The decision of the court in this case tends to indicate, that had the bombed target been governmental or military installations, i.e. the political structures of a state and incidental to political upheaval, Eain's act would have been protected under political offense exception. This may be observed from the case of United States v. Mackin,[70] where extradition was denied on the ground of political offense. The court in this case recognized that IRA was engaged in military like operations and Wooton was a soldier on duty. The relevant facts of the case are as follows,[71]

' The British government's request for Mackin's extradition was based on his indictment in Northern Ireland on charges of attempted murder on March 16, 1978, of a British soldier, Stephen Wooton; wounding him with intent to do grievous bodily harm; and possession of firearms and ammunition. Mackin was arrested in Northern Ireland but was released on bail and failed to appear for trial there and entered United States.'

In this case, the magistrate denying the extradition request found that,[72]

> " (1) at the time of the offense charged against Mackin the Provisional Irish Republican Army (PIRA) was conducting a political uprising in the portion of Belfast where the offenses were committed;
>
> (2) that Mackin was an active member of PIRA: and
>
> (3) that the offenses committed against the British soldier were incidental to Mackin's role in the PIRA's political uprising in Belfast. Accordingly, she concluded that the crimes for which Mackin was indicted were 'of a political character ..."

United States, on behalf of the British government appealed from the decision of the magistrate but the appeal was dismissed for the lack of jurisdiction as no direct appeal lay from a judicial officer's finding in extradition hearings.[73]

As observed from the cases mentioned above the United States courts are applying the principles enunciated in Castioni in 1891, to distinguish terrorist acts from acts protected by the concept of political offense exception. The courts in the United States are trying to keep the acts of terrorism outside the ambit of the political offense exception by adding extra qualifications to these principles, however without much uniformity as the Judges are seen to be extending this principle according to their own individual perception.

This practice was reaffirmed in the recent case of Quinn v. Robinson, (1986)[74] where, ' Quinn, a United States citizen, was arrested on September 30, 1981 in Daly City, California, upon application of the United States acting for and on behalf of the United Kingdom. On November, 1981, the United Kingdom formally requested Quinn's extradition to face charges of the murder of police constable Stephen Tibble and conspiracy to cause explosions of a nature likely to endanger human life. Quinn contended that the murder of officer Tibble was a political offense because it was motivated by the killer's fear that, if captured, he would be forced to reveal information about PIRA activities. A United State Magistrate conducted preliminary proceedings and a hearing to determine extraditibility.'[75]

' The Magistrate rejected Quinn's argument and held that in order to qualify for the protection afforded by the political offense exception, Quinn had to show three elements: that there was a violent political uprising,[76] that he was a member of the uprising group, and that the crimes were committed in furtherance of the uprising. The Magistrate concluded that there was a violent political uprising in the United Kingdom at the time of the alleged crimes sufficient to bring into play the political offense exception. However, he found that Quinn had not proved the other two elements of a political offense. The Magistrate found that the bombings failed to meet the ' direct link'[77] test because they were directed at civilians rather than the government. And the murder of constable Stephen Tibble was motivated by a simple desire to escape capture.'[78]

Quinn filed a Petition for writ of Habeas Corpus. In granting Quinn's petition the district court identified three legal errors in the Magistrate's analysis and found that the magistrate erred in his factual findings regarding Quinn's membership in the PIRA and the killer's motive for the Tibble murder,[79]

> " First, the district court held that the magistrate was wrong in requiring Quinn to show, as a separate element, membership in an uprising group. Second, the district court concluded that the magistrate erred in imposing a requirement that acts potentially be politically efficacious or directed

> by a hierarchy within the PIRA in order to meet the requirement of being " incidental to" the uprising. Third, the court disagreed with the magistrate's application of Eain to this case, noting that the motive of the petitioner in Eain a member of the Palestinian Liberation Organization (PLO), in bombing civilians was to drive them out of Israel. Here, in contrast, the court found that the motive was to influence the British government in its relationship with the PIRA and Northern Ireland and that the potential harm to civilians was merely a consequence of the activities designed to influence the government. As to the Tibble murder, the district court determined that the magistrate erred in finding no political motive. Although it agreed that the killing was the result of an effort to avoid immediate capture, the court said that it was incidental to avoid a capture that could lead to the discovery of the bomb factory."

The United States on behalf of the United Kingdom appealed the decision of the district court. Reinhardt, Circuit Judge, rendering the judgement for the United States Court of Appeal said,[80]

> " For extradition to be denied for an otherwise extraditable crime on the basis that it falls within the protective ambit of the political offense exception, the incidence test must be accordingly met. The incidence test has two components, designed so that the exception comports with its original justifications and protects acts of the kind that inspired its inclusion in extradition treaties. First, there must be an uprising - a political disturbance related to the struggle of individuals to alter or abolish the existing government in their country. An uprising is both temporally and spatially limited. Second, the charged offense must have been committed in furtherance of the uprising; it must be related to the political struggle or be consequent to the uprising activity. Neither the objectives of the uprising nor the means employed to achieve those objectives are subject to judicial scrutiny. And while the nature of the uprising group and any evidence of the accused's motivations may be relevant, proof on these elements is not required or necessarily determinative. Acts of international terrorism do not meet the incidence test and are thus not covered by the political offense

> exception.[81] Crimes against humanity also are beyond the scope of the exception.
>
> The conspiracy to cause explosions and the murder with which Quinn is charged do not fall within the political offense exception. Although an uprising existed in Northern Ireland at the time the charged offenses were committed, there was no uprising in England. The crimes did not take place within a territorial entity in which a group of nationals were seeking to change the form of the government under which they live; rather the offenses took place in a different geographical location. We do not decide whether Quinn's status as a citizen of an uninvolved nation would also preclude him from receiving the protection of the exception."[82]

And it was held that;

> " Quinn may be extradited on the murder charge but that the district court must consider whether the conspiracy charge is time - barred before extradition is permitted for that offense."[83]

The decision in Quinn rendered by Judge Reinhardt indicates two additional requirements that might affect the issue of political offense exception, viz,

(i) geographical limitation; and

(2) nationality of the accused.

(i) As far as geographical limitation is concerned, Judge Reinhardt was of the opinion that,[84]

> " the crime should take place within a territorial entity in which a group of nationals are seeking to change the form of the government under which they live."

This statement by Judge Reinhardt may be argued as another effort - trying to distinguish acts of terrorism from offenses of a political character. As normally, terrorists in contrast to political offenders do not (necessarily) operate within the territorial entity in which they are seeking to change the form of the government. However, this statement by Judge Reinhardt is untimely as Northern Ireland is still a part of the United Kingdom which renders his statement unreasonable. These additional qualifications stated by Judge Reinhardt are not in line with Castioni. Judge Duniway, concurring with the judgement however, was of a different opinion regarding the question of geographical limitation as he said,[85]

> " The limitation may be useful to us in this case, but I doubt this is a valid one ... Assume that we had a comparable treaty with the government of Nicaragua. Suppose that, today, a citizen of Nicaragua, active in the so-called contras, were to sink a vessel owned by the sandinista government on the high seas, and flee to this country. Would we grant extradition because his act did not take place within the territorial waters of Nicaragua ?"

Similarly, Judge Fletcher concurring with the judgement but dissenting with Reinhardt's conclusion said,[86]

> " I cannot agree with judge Reinhardt's conclusion that when PIRA members revolt against their British rulers in Northern Ireland, such acts are protected under the political offense exception, whereas the identical violent acts carried out against the same British rulers in London lose their protected status."

On the issue of the nationality of the accused, Judge Fletcher was of the opinion that;[87]

> " I must address whether this protection extends to one who, like Quinn, is a citizen of different nation from that in which the uprising is occurring. I do not believe that mercenaries or volunteers in a foreign conflict can claim protection under the political offense exception ... To be entitled to protection, an individual will have to demonstrate tangible and substantial connections with the country in which an uprising occurs. It could be short of citizenship, but there must be a showing

> of substantial connection -- for example, that he or she had lived in the country or territory and planned to continue to live there under a changed regime."

However, Castioni does not require that the persons involved should be of the involved nation. This author is of the opinion, ideological supporters should be afforded protection under this principle but should not be used to cover the acts of mercenaries. As mercenaries are people who work for money and not for any political belief.

Judge Fletcher was also critical of the test adopted by the court in Eain v. Wilkes, when he said,[88]

> " I believe the seventh circuit in Eain improperly rested its decision on its conclusion that only organized forms of aggression are afforded protection under the political offense exception and on its distinction between attacks on military and civilian targets ... I agree with Judge Reinhardt that the incidence test neither requires proof of membership in an uprising group nor recognizes a distinction between attacks on military and civilian targets."

Regarding the question of the target involved i.e., whether military or civilian the court cited the opinion expressed in In Re Doherty that,[89]

> " The ' incidental to' component, like the incident test as a whole, must be applied in an objective, non - judgemental manner. It is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or changing the government. All that the courts should do is determine whether the conduct is related to or connected with the insurgent activity,.It is clear that various " non - military" offenses, including acts as disparate as stealing food to sustain the combatants, killing to avoid disclosure of strategies, or killing simply to avoid capture, may be incidental to or in furtherance of an uprising. To conclude that attacks

> on the military are protected by the exception, but that attacks on private sector institutions and civilians are not, ignores the nature and purpose of the test we apply, as well as the realities of contemporary domestic revolutionary struggles."

This reference by the court renders the whole argument unreasonable, as it would follow that the courts have nothing to do whatsoever regarding the determination of tactics applied by the revolutionaries that may help them bring down or change the government. This would mean that courts have no authority to decide a case on the basis of the target involved, as it will be for the revolutionaries to select the target in order to help further their revolution. Thus it may be argued that the courts in the United States are applying the principles enunciated in Castioni in a flexible way.

The decision of the United States courts in the cases discussed above are seen to be imposing a number of limitations on the exception; moreover, the courts lack unanimity in their decisions while applying the test as enunciated in Castioni. The practice of the United States courts thus, is not uniform at present.

Canadian practice also applies the incidence test. One of the earliest cases relating to an offence of political character was Re Fedorenko (No.1).[90] The relevant facts of the case are as follows, ' Fedorenko, was accused of murder of a village watchman in Russia, when asked for his identity papers. Russia requested for extradition for the alleged murder.'[91]

Mathers, J. committed Fedorenko for surrender, and while considering the political character of the act he adopted the reasoning of Denman, J. in Castioni, as he said in the judgement that,[92]

> " Can it be said that this killing was in furtherance of a political object? I think not. Nor do I think the fact that the crime of the accused would, in the demanding state, be called a political crime and be tried by a special tribunal makes it a crime of a political character ... The crime of killing a policeman by a person in no way identified with any political movement would in Russia be so described, and would be tried by the same tribunal."

However, upon appeal Fedorenko was discharged as there was no proper requisition for his extradition from the Russian government.[93]

It appears that the Canadian courts in their later practice have adopted the views expressed in Schtraks.[94] Thus, in Re Commonwealth of Puerto Rico and Hernandez,[95] after referring to Schtraks it was held on the basis of Castioni that the act for which the accused had been charged, was not political. In this case, ' The accused a member of a Puerto Rican independence movement had been charged for killing of a police officer during riots in Puerto Rico. His extradition was requested by the government of Puerto Rico.'[96] Although the extradition request was denied on the grounds of insufficient evidence however, on the question of political offence Honeywell, Co.Ct.J., was of the opinion that,[97]

> " In my opinion, the murder of ... was not an offence of a political character. What took place on March 11th was, in essence, a one-sided ' on campus' confrontation between students ... Its

> object was not to overthrow the government ... the actual shooting ... was deliberate and intentional ... I have found that the offence of murder in this case was not an offence of a political character ...."

Moreover, in Re State of Wisconsin and Armstrong,[98] Waisberg,J., relied on Viscount Radcliffe's formulation in the Schtraks case. However, the decision in this case has limited the role of judiciary in Canada in the determination of whether a crime is of a political character. Regarding the role of extradition judge, Thurlow, J. was of the opinion that[99]

> " ... in Canada extradition judge is not empowered by the Act to determine the question or to discharge a fugitive on the ground of the offence being of a political character and it appears to me to follow from this that having been satisfied that the evidence with respect to the offences was sufficient to justify committal for trial ... there can be no error in law in the learned Judge having issued his warrant, regardless of his conclusions as what the evidence showed with respect to the political character of the offences ... I do not think it is open to this Court on this application to enter upon and decide the question of the political character of the offences for the purpose of determining the legality of the applicant's imprisonment ..."

Thus it would appear from the decision rendered in this case that with respect to the political character of the offenses, the extradition Judges in Canada have a jurisdiction for a limited purpose of deciding whether or not to issue an extradition warrant.[100]

In Canada, the determination as to the political character of an offence is made by the executive acting through the

Minister of Justice.[101] On the other hand, it is difficult to assess the application of the incidence test to acts of terrorism by the Canadian courts as Canada is yet to be faced with such a request.

The French practice may be observed from the decisions handed down by the French courts in In re Holder and Kerhow,[102] and the case of Abu - Daoud.[103] These decisions seem to ignore the general notion of the states that the political offense exception should not be applied and interpreted to cover the acts of terrorism.

In the former case,[104] ' The United States Government, requested from France, the extradition of two United States nationals on charges relating to the hijacking of a plane from Los Angeles to Seattle.' The French court denied extradition on the ground that the acts for which the accused were wanted constituted a political offense. Although, ' the United States Government contended that hijacking was an ordinary criminal act, especially when it resulted in the extortion of $ 500,000 from the airline company. The evidence, relied upon by the French court in establishing the act as an act of political offense was that during the incident, one of the hijackers had ordered the aircraft to be flown to Hanoi, but had changed his mind later.'[105]

Similarly, in the case of Abu - Daoud, where, ' Daoud had been suspected of having committed murders and other offenses in Munich in September 1972 against persons participating in the Olympic Games, majority of whom were Israeli nationals. His extradition was requested first by the West German and, a few days later by the Israeli authorities. The Chambre d' accusation of the Cour d' Appel of Paris rendered two judgements on 11 January 1977.'[106]

> " In the first judgement it was held that the request of the German authorities for the extradition of the accused was inadmissible since the formal requirements laid down in Franco-German Extradition Treaty of 29 November 1951 had not been complied with ...."[107]

In the second judgement considering the request of the Israeli authorities the court held that " The request ... for extradition was inadmissible and the accused should therefore be released unless detained for some cause."

It was said in the judgement, that;[108]

> " The person named as Raji Yousef Ben Hanna, born on 16 June 1937 in Baghdad, is the subject of request for his provisional detention with a view to extradition by the Israeli authorities to enable a warrant for his arrest issued by judge Shalvi of the Jerusalem court on 10 January 1977 to be executed. The warrant alleges the commission of murders, manslaughter, conspiracy to commit those crimes. The identity given for the author of the crimes was Muhammad Daoud Eith Halidi El Silwani, known under the name of Abu - Daoud, born in Jerusalem in 1937.
>
> Art.3 of the Law of 10 March 1927 lays down that extradition shall only be granted where the offence in question was committed;
> --- on the territory of the requesting State by either a national of that State or a foreigner;
> --- or outside the territory of the requesting State by a national of that State;
> --- or outside the territory of the requesting State by a foreigner, where the offence is amongst those for which French law authorizes the institution of proceedings in France even though the offenses were committed by a foreigner abroad.

> The request made by telegram by the Israeli authorities states that the criminal actions allegedly committed by the person concerned occurred in September 1972 on the Federal Republic of Germany.
>
> Raji Ben Hanna asserts that he is an Iraqi national and has submitted identity papers and a passport proving his nationality.
>
> The Law of 11 July 1975 grants jurisdiction to French courts to try any foreigner guilty of committing a crime abroad, where the victim of that crime is of French nationality. Nevertheless that provision does not allow the application to this case of the last paragraph of Art.3 of the Law of 10 March 1927 mentioned above, even though the majority of the victims of the acts described were of Israeli nationality. The Law of 11 July 1975 cannot be given retroactive effect and applied to acts committed in September 1972, since its provisions worsen the position of the foreigner who is the subject of these proceedings.
>
> It follows that, without it being necessary to examine the facts, despite their exceptional gravity and the political character which might be attributed to them, the extradition of Raji Yousef Ben Hanna cannot be granted under any circumstances and the request of the Israeli Government is inadmissible.
>
> It is therefore appropriate to order the release of Raji Yousef Ben Hanna."

' The decision of the French court in this case was criticized by many Western governments and journalists as having been politically motivated. They contended that, the court had yielded to the pressure of the French Government which, in turn, had succumbed to possible Arab oil threats and terrorist blackmail.'[109]

However, ' later decisions given by the French courts suggest that they are becoming more stringent than they have been in the recent past in dealing with foreign terrorist defendants.'[110] For example, in the Klaus Croissant Case,[111] where ' Croissant, a West German national and a former attorney for members of the Bader - Meinhof gang, was charged with aiding a criminal group accused of assassinating prominent businessmen and governmental official and propagandizing on its behalf. Croissant escaped bail in Germany and sought refuge in France. The West German Government issued a request for extradition of Croissant.'[112] The French cour d' appel on November 16, 1977, rendered a partially favourable decision, granting extradition in respect of only one of the charges contained in the arrest warrant. The court ruled that;

> " Croissant could be extradited for [his] having, as a lawyer, contributed to organizing and operating an information system between imprisoned terrorists and others in liberty by transmitting correspondence, instruction and documents favouring, as a consequence, their activities."[113]

Commenting upon this sudden change in the attitude of the French court, one author comments that;[114]

> " The cour d' appel's consideration of the merits of the case reflected a high and unimpeachable standard of judicial conduct; accusations of judicial subservience to executive branch opinions and assessments of political exigencies cannot properly be levied at the court. The court gave close scrutiny to the charges contained in both arrest warrants ... The court rendered only a ' partially favourable' decision based upon the charge that Croissant, in his capacity as a lawyer, had acted as an information link between imprisoned terrorists and others in liberty and, hence, favoured their activities."

This attitude of the French court was further reaffirmed in the Piperno Case.[115] In this case, ' Piperno, a university professor, and a leader of the leftist " autonomy" movement in Italy had been charged with complicity in the murder of former Premier Aldo Moro and forty five other crimes. Piperno was arrested by the French police in Paris on August 21, 1979 on the basis of an extradition request by Italy.'

' The cour d' appel decided the case in October, 1979, concluding that there was sufficient evidence to support the charges as an accomplice with respect to the kidnapping and murder of Aldo Moro. However, the court found twenty seven of the forty six charges against Piperno unacceptable, because they were not among the crimes enumerated in the Franco - Italian Extradition Convention of May 12, 1870.[116] In addressing the issue of the applicability of the political offense exception, the court said;

> " The court has already affirmed several times in this decision the ordinary law nature of the charges brought. However, it cannot deny the fact that these crimes would be placed in a political context, allowing the defense to invoke, on a purely subsidiary level, their political nature and to request the court to reject the request for Piperno's extradition.
>
> Yet, the court notes the extreme seriousness of the charges for, apart from the physical and mental torture inherent in a confinement of several weeks' time, the charges involve the murder of an innocent person held against his will.
>
> Whatever the purpose of such acts and regardless of the context in which they might be placed, they may not, in view of their seriousness, be considered political in nature.

> This is the principle on which the provisions of Art.5(2)(2) of the Law of March 10, 1927 are based, permitting extradition when heinous acts of barbarity are committed during an insurrection or a civil war.
>
> Thus, if the aforesaid law precludes justification for political reasons of the most serious acts even when committed during a period of declared violence such as an insurrection or a civil war, there would thus be even less justification for them in the absence of such extreme circumstances when the legal institutions of the requesting country are operating fully and normally.
>
> Otherwise, any individual could be put to physical harm and even death because of his beliefs or his duties, a possibility with respect to which the defense has affirmed its opposition several times in its pleadings.
>
> Under these conditions, it is the opinion of the court that the crimes under consideration are in no way political in nature."[117]

" Thus the French cour d' appel held that these motives were far outweighed by the gravity of the crime and the manner of their execution."[118] These decisions by the French courts are clear evidence of the change in the French practice.

On the other hand some states are concluding stringent extradition treaties to exclude acts of terrorism from the ambit of political offence exception. These treaties tend to specify offenses which are not to be considered as ' political offenses'. This for example, is evident from the recent treaties concluded between the following states, the Protocol between Canada and the United States (1988),[119] in Art. 4(2) provides a whole list of offenses which are not to be considered as offenses of a political character. Similarly the

Supplementary Treaty concluded between United Kingdom and the United States (1985),[120] in Art.1 provides a list of offenses which are not to be regarded as offenses of a political character. Similarly, the European Convention on the Suppression of Terrorism (1976),[121] has virtually discarded the concept of 'relative political offense'. The European Convention on Terrorism[122] urges the state parties to the Convention to make subsequent amendments and Art.1 of the Convention provides a list of offenses, which are not to be regarded as political offenses or as a offenses connected with political offenses or as offenses inspired by political motives. These treaties indicate limitations on the concept of relative political offenses.[123]

b. OFFENSES OF MILITARY CHARACTER;

> " Military offense is an offense which is punishable only as a violation of military law or regulation, and which would not be punishable as a violation of a civil law or regulation if the military law or regulation did not apply,"[124]

and ' some of the principal military offenses are desertion, cowardice, the doing of violence to a superior, and sale or appropriation of arms etc.'[125]

Provision prohibiting the extradition of offenders under the military law of the requesting state is found in a considerable number of treaties and national statutes.[126] For example, the Extradition Treaty between United States and Italy signed at Rome on Oct. 13, 1983,[127] in Art. V(3) provides, " Extradition shall not be granted for offenses under military law which are not offenses under ordinary criminal law." Similar provision is found in Art. 4 of the European Convention on Extradition (1953),[128] which provides " Extradition for offenses under military law which are not offenses under ordinary criminal law is excluded from the application of this convention." And the Convention concerning Extradition and judicial assistance in criminal matters (1956) between Israel and Italy[129] provides in Art.5 that, "Extradition shall not be granted if the offence for which extradition is requested consists solely in the violation of military obligations."

The above mentioned provisions and the definition as used in the Harvard Draft indicate that acts which are punishable under the ordinary criminal law are not to be considered as military offenses. Thus, offenses such as murder of a superior officer or stealing unit funds etc., are not considered as military offenses. ' The rationale for the exclusion of military offenses from extradition, rests on the appraisal of the very offense, i.e., it is peculiar rather than general and affects a given state without causing any harm to the world community as in the case of international crimes.'[130] However, not all extradition treaties list military offenses as non-extraditable, some of the treaties which do not include military offenses in exclusion are for example; The Convention of Extradition and Judicial Assistance in Penal Matters, signed on 27 June 1962 between Belgium, Luxembourg and the Netherlands, which provides in Art.3(2)(b),[131] " Although political offenders are not subject to extradition, military desertion is not to be deemed political."

Similarly, the Extradition Treaty between Columbia and Panama (1927),[132] provides in Art.4(b), that

> " Extradition shall not be granted;
>
> b) In respect of political offenses or acts connected therewith (except offenses committed or attempted against the life of the Head of the state, offenses against religion and misdemeanours or contravention of a purely military character).

The provisions of the treaties mentioned above indicate that military offenders may be extradited. The Convention on Judicial Assistance, however lists ' military desertion' as the only offense deemed to be extraditable, whereas, the Extradition Treaty between Columbia and Panama 1927, provides for the extradition of offender(s) even when the offense(s) is of purely military character. But, normally states do not grant extradition where the offense is of a purely military character. Thus in Ktir v. Ministère Public Fédéral (1961),[133] where, ' Ktir a French national, who was a member of the Algerian Liberation Movement (F.L.N.), responsible with three other persons for the murder in France of another member of the F.L.N. was extradited upon the request of France.' The Swiss Federal Tribunal granting the extradition said,[134]

> " As regards the second point, the appellant probably means to rely on Art.II of the LE which provides that, extradition shall not be granted ... for purely military offenses. That provision is

> not, however, applicable, since the treaty does not contain any analogous reservation. Furthermore, murder has never been regarded as a ' purely military' offense, because it affects human life and does not relate to military organization or military duties."

However, the concept of military offense hardly finds any room to operate in the Canada - United States; Protocol of (1988), as Art. II deletes the ' schedule' of the treaty and Art.I replaces Art.2 in accordance with which an ' offense is extraditable if punishable by imprisonment for more than one year in both countries.' This amendment would mean, that an offense even though of a ' purely military character' is to be deemed extraditable if punishable in both the countries by imprisonment of more than one year.[135]

c. FISCAL OFFENSES;

" Fiscal offense is an offense in connection with the customs or revenue law of a state, and not involving misuse of public funds."[136] Early treaties used to allow extradition for smuggling, counterfeiting or for the violation of the revenue laws of the requesting state.[137] However, the later practice of states indicate the exclusion of fiscal offenses from extradition. And, Prof. Bassiouni comments that, ' before the twentieth century, extradition was closely interwoven with European history and between the sixteenth and eighteenth centuries Europe's fiscal and economic structure was chaotic and oppressive, and this explains the origin of the exclusion.'[138]

Still, the provisions of the bi-lateral treaties between some states specifically exclude fiscal offenders from extradition for example, the Extradition Treaty between Germany and Turkey (1930),[139] in Art. 5(3) provides;

> " The obligation to grant extradition shall not lie:
>
> (3) In respect of an offense which is punishable only in virtue of the fiscal laws"

and the Extradition Treaty between Israel and Switzerland (1958)[140] provides in Art.(3) that,

> " Extradition shall not be granted if the offence in respect of which it is requested:
>
> (3) consists in the violation of fiscal legislation."

Similar provision is to be found in the Extradition Treaty between Switzerland and Turkey (1933),[141] which in Art.4(b) provides, " Extradition shall not take place;

> (b) when the punishable act which determined the application is of a fiscal ... character ..."

However, the situation at present is different. The expansion of commercial relation between various states have put them under an obligation not to encourage such offenses. And fiscal offenses are no longer considered in some treaties as exempt from extradition. Thus, the Indo - Nepalese Treaty (1963) provides in Art. 3(11) that,

> " The offenses for which extradition is to be granted in accordance with this Treaty are the following, namely:
>
> (11) offenses against the laws prohibiting the

export and import of goods."[142]

And, the Extradition Treaty between United States and Brazil (1961-62) provides in Art. 2(29),

> " Persons shall be delivered according to the provisions of the present Treaty for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following crimes or offenses:
>
> (29) Smuggling, defined to be the act of wilfully and knowingly violating the customs laws with intent to defraud the revenue by international traffic in merchandise subject to duty"[143]

and the Protocol explicitly states in Art. I, that,[144]

" fiscal crimes are extraditable."

The provision of the European Convention,[145] on the other hand is different as it is provided by Art. 5 that,

> " Extradition shall be granted, in accordance with the provision of this convention, for offenses in connection with taxes, duties, customs and exchange only if the contracting Parties have so decided in respect of any such offense or category of offenses."

The provision of the European Convention, only includes them if the contracting parties have so decided. The exclusion of persons accused of fiscal offenses is of little significance in the present era of growing international trade and economic cooperation between states.

2. GROUND RELATING TO THE RELATOR;

a. NATIONALS

Nationality of the accused is one of the bases upon which the request for extradition may be denied. The practice of states shows that civil law countries do not extradite their own nationals whereas, countries adhering to the common law system do not draw such a distinction.[146] In accordance with the provisions found in different extradition treaties, this principle may be classified as;

(i) Treaties, where without making any specific reservation in favour of nationals, provision is made for extradition of all or any persons; for example, the Extradition Treaty between United Kingdom and the United States,[147] signed on 8th June 1972, in Art. I provides;

> " Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense ..., committed within the jurisdiction of the other Party."

Similarly Art. 1 of the Extradition Treaty between Canada and the United States (1976), provides that,[148]

> " Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory ..."

In accordance with the provision of these treaties, persons are subject to extradition once the necessary circumstances and conditions of the treaty have been fulfilled, without making any discrimination between national or non-nationals. On the other hand, the Organization of American States; Inter-American Convention on Extradition (1981), provides in Art.7(1),[149]

> " The nationality of the person sought may not be invoked as a ground for denying extradition, except

> when the law of the requested State otherwise provides."

This provision gives the right to the requested state to defer extradition of one's national if it is so provided by the law of the state requested.

(ii) Treaties where neither of the contracting Parties are bound, or, have the right to refuse extradition of its national. For example Art.6(1)(a) of the European Convention (1953),[150] provides, " A Contracting Party shall have the right to refuse extradition of its nationals."

Similarly Art.(viii) of the Extradition Treaty between Venezuela and the United States (1922),[151] provides, " Under the stipulations of this Convention, neither of the contracting Parties shall be bound to deliver up its own citizen."[152]

These treaties expressly deny or give the right to deny extradition of their own nationals.

(iii) These types of treaties provide that, ' neither of the contracting Parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each state shall have the power to deliver them ,if, in its discretion, it be deemed proper to do so.'[153] Provision to this effect is to be found in the Extradition Treaty concluded between the United States and France in (1970),[154] Art.III of which reads;

> " There is no obligation upon the requested states to grant the extradition of a person who is a national of the requested state, but the executive

> authority of the requested state shall, in so far as the legislation of that state permits, have the power to surrender a national of that state if, in its discretion, it be deemed proper to do so."

And, the Convention concerning extradition and judicial assistance in criminal matters (1956) between Israel and Italy,[155] contains in Art.3,

> " Each Contracting Party shall have the right to grant or refuse the extradition of its own nationals.
>
> Extradition shall however be granted if, at the time of the offence, the person claimed was not a national of the State to which application is made."

These provisions expressly give the executive authority of the requested state discretion for the extradition of its own nationals.[156] Provisions to similar effect are to be found in treaties concluded between United States and Japan (1886),[157] United States and Mexico (1899),[158] and United States and Argentina (1900).[159]

As per the classifications mentioned so far, states possess discretion whether to extradite their nationals or not according to classification (ii) and (iii). Whereas, regarding classification no.(1) states do not have the right to exercise such discretionary power as the use of the term " all or any" person(s) includes one's own nationals. However, the application of these classifications are only viable in a situation where the national legislation of the particular state allows it to do so. For example, The Convention on Extradition between the United States and Israel (1963),[160] states in its Art IV that; " A requested Party shall not decline to extradite a person sought because such person is a national of the requested Party."

The treaty of 1963 (between Israel and the United States) and 1956 (between Israel and Italy) were concluded when Israeli Extradition Law (1954), permitted extradition of her nationals. The situation at present however, is different as the Israeli Extradition Law of 1954 permitting the extradition of nationals was amended by Bill No. 1306 of 25 July 1977.[161] Thus, the Extradition Law as amended no longer allows the extradition of Israeli nationals and so renders the provision of the above mentioned treaties ineffective.

On the other hand, the denial of extradition on the basis of nationality defeats the purpose of extradition treaty if the accused is to go free merely because of the reason that he/she happened to be the national of the state requested. Thus, states do make provision in their treaties to punish such offenders if they are not willing to extradite them on the ground of nationality. For example, the Extradition Treaty between Belgium and Brazil (1953),[162] in Art.1 states that,

> " If the person is a national of the State applied to, the said State shall not be obliged to surrender him. In such cases, if extradition is not granted, the person whose extradition is applied for shall, if the laws of the State applied to so allow, be proceeded against and tried in the said State. In that event, the applicant State shall be responsible for supplying the necessary evidence for the prosecution and the trial of the accused, and the final judgement or decision shall be communicated to the said State."

And the Treaty concerning the provision of legal assistance in civil, family and criminal cases between Union of Soviet Socialist Republics and Democratic People's Republic of Korea (1958),[163] in Art.55(1) of the treaty contains that

> " Each Contracting Party undertakes to prosecute under its own law, at the request of the other Party, any of its citizens suspected of having committed an extraditable offence in the territory of the other Party."

Similarly, Art 345 of the Bustamante Code(1927) provides; " The contracting states are not obliged to hand over their own national. The nation which refuses to give up one of its citizens shall try him."[164] Thus, in Re López Saravia (1957),[165] where, ' López Saravia a national of Honduras, while in the Republic of El Salvador committed the crime of homicide and then fled to Honduras. The District court of El Salvador, filed a petition with the Honduras Supreme Court for extradition of the accused. The accused was arrested and brought before the single Supreme Court Judge appointed to hear his plea. Extradition was refused on the ground that it was not obligatory to extradite a national of one's own country.' On appeal to the full Supreme Court; it was held,

" that the decision of the Judge of first instance must be affirmed. "

The court said,[166]

> " After due consultation of the judgement rendered in first instance ... in which extradition of the accused, ... is refused ...."

> ' The above judgement was based on the following consideration,

> (a) ' That the accused ... has accredited his status as a native of Honduras ... and
>
> (b) ' that according to the provisions of Art. 345 of the Bustamante Code, the contracting parties are not compelled to deliver their own nationals, but rather to try them in their own competent courts."

The decision of the Supreme Court of Honduras and the provisions of the treaties mentioned earlier indicate that in case of denial of extradition on the grounds of nationality, states have the obligation (if the treaty or the local law so provides) to try such offender(s) in their own competent courts.

The reason for denying the extradition of one's own nationals is not easy to justify, as J.L. Brierly, in a report on extradition submitted in 1926 to the League of Nations Committee for the Progressive Codification of International Law[167] supported the principle of extradition of nationals;

> " It is, however, not easy to justify in principle the policy of refusing to extradite nationals. The theory that a state should try its own nationals for crimes wherever committed fails as a justification for two reasons: (a) because in many cases it is impracticable to try a crime committed in another country on account of the impossibility of securing the relevant evidence; and (b) because the argument cannot have any application to a national who has escaped to his own country after conviction in a foreign country, since on general principles of justice such a person may not be tried again for the same offence. If, on the other hand, the refusal to surrender a national arises from a lack of confidence that justice will be rendered to him in the foreign state, that would seem to be a reason which would justify the refusal of extradition to that state altogether, but could not justify the practice of differentiating between nationals and other persons."

However, the reason attributed for the denial in Re Milazzo, alias D'Amore (1956),[168] by the Argentina Supreme court was attributed as humanitarian consideration. The relevant facts of the case are as follows, ' Milazzo alias D'Amore, the accused was arrested in Argentina pursuant to a request for provisional detention made by the Embassy of the United States, which at the same time initiated extradition proceedings. He was accused of grand larceny committed in New York on September 20, 1948. The accused, an Argentine National, applied for trial in Argentina, pursuant Art.669 of the code of criminal Procedure, which grants this right of choice when the accused is of Argentine nationality. It was held at the trial, and later on appeal, that the accused should be tried in Argentina. On further appeal, Argentina, Supreme Court of Justice, on Sept. 28,1956 said,

> " The treaty therefore establishes delivery as the general principle, but with the reservation of cases in which the requested Government deems it advisable not to acquiesce in the extradition ... As to the advisability of not granting extradition, this depends on the personal and family circumstances of the individual demanded, and these appear on the record. This is a case of Argentine citizen married to the woman of the same nationality, with two children now of the ages of thirteen and eleven years, all of whom he supports by his work in honest activities and who enjoys a good reputation for that reason and for his good conduct."

Apart from treaties, legislation of some states expressly prohibits the extradition of their national for example, the Constitution of the Federal Republic of Germany, expressly states in Art. 16(2)[169] that, " No German may be extradited to a foreign country ..."

Thus it was held in Extradition (Germany) case (1959),[170] by the Federal Constitutional court that,

> " Art.16(2) of the constitution not only prohibited the extradition of a German citizen to a foreign country, but equally prohibited his being handed back to the country from which he had come in order that his extradition might be accomplished through the territory of a country other than Germany."

Although it is not easy to justify the non-extradition of nationals, however, this provision still finds mention in extradition treaties. It may be of little significance in the near future in view of the present attitude of states regarding terrorists. In view of stringent extradition treaties concluded between some states[171] it is doubtful that the provision will find any room to operate.

3. GROUNDS RELATING TO THE PROSECUTION OF THE OFFENSE CHARGED;

This is another basis upon which a request for an extradition may be denied, and this ground may be further classified as;

a. Trial in absentia; and

b. Statute of Limitation

a. TRIAL IN ABSENTIA;

The validity of this type of trial i.e., trial in absentia finds no specific mention in extradition treaties[172] although, the use of the terms ' convicted' and ' accused' are found to be mentioned.[173] However, it is difficult to say whether the term "convicted" used as such in the treaties does in fact include those persons convicted by ' trial in absentia'. The extradition acts of states do not seem to provide any clear idea regarding this problem. For example, the Extradition Act (1970)[174] of Canada, in Art. 2 provides,

" In this Act

> " conviction" or " convicted" does not include the case of a condemnation under foreign law by reason of contumacy; but " accused person" includes a person so
> " condemned."

This provision is indeed confusing. However, broad interpretation was accorded by the English High Court of Justice, Queen's Bench Division in 1960 in the case of R. v. Governor of Brixton Prison ex parte Caborn-Waterfield.[175] The relevant facts of the case are as follows;

' The applicant was duly summoned by the Public Prosecutor in France to appear before the Criminal Court for stealing approximately 23 million French francs and 7,000 U.S. dollars. The applicant was represented by counsel and did not appear in person. The applicant failed to appear for the adjourned hearing and was convicted of the charge against him and sentenced to four years imprisonment. The conviction of this type is known to the French criminal law as a "judgement par défaut." And anyone against whom such a judgement is pronounced has the right at any time there after, upon notice to have the judgement set aside and the case decided in his presence. The applicant gave appropriate notice through his advocate, but again failed to appear on the given date. The Court then, in accordance with the French Law, pronounced judgement and confirmed the former conviction and sentence. The latter judgement is known in the French criminal law as 'judgement itératif défaut.' Unless a notice of appeal against such a judgement is given within 10 days it becomes final. No notice of appeal was given within the due date. later, the applicant was arrested in London on a warrant stating that, requisition had been made to Her Majesty's Secretary of State for Home Affairs for the Surrender of the applicant suspected and accused of the commission of the crime larceny within the jurisdiction of Government of France.'[176]

' The applicant was brought before the magistrate and committed to Brixton Prison for extradition on the ground as stated in the warrant. The applicant applied to the court for a writ of habeas corpus, submitting that magistrate's order was unlawful on the grounds (i) that he was proceeded against as a person accused and not as a person convicted; (2) that the English notions of substantial justice were offended thereby; and (3) that in law and in fact the order should not have been made.

The applicant argued on the first ground that the Extradition Act, 1870, distinguished between an accused and a convicted person and that under section 10 of the Act the conditions to be satisfied before an extradition order could be made were different. The "judgement itératif défaut" of the French court was a conviction and not a "conviction for contumacy" within Sec. 26.[177] The "judgement itératif défaut" could not be set aside and amounted to a conviction.'[178]

The court allowed the application and discharged the applicant. It was said in the judgement that;[179]

> " In the present case the applicant was committed under the first paragraph of Section 10 as an accused person but there is no question of his being tried if he is surrendered. He has already been tried convicted and sentenced. If surrendered, he will go to prison to serve his sentence without any further proceedings. Accordingly, if Section 10 means what it plainly says, the magistrate has wrongly committed the applicant under the first paragraph of section 10. The respondents argue, however, that the prime facie meaning of the words 'accused' and ' convicted' in section 10 are altered by section 26 of the Extradition Act,1870. This is an interpretation section and states; ' The terms 'conviction' and ' convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term ' accused person' includes a person so convicted for contumacy ... In our view, the words ' for contumacy' in section 26 of the Act of 1870 were intended as a translation of the French words ' par contumace'... In our judgement, a conviction for countumacy does not include a final judgement ' itératif défaut' which is radically different in character from a conviction par contumace. A fugitive criminal convicted ' par contumacy' would upon his surrender be tried, whereas a fugitive criminal subject to final conviction "iteratif défaut" would on his surrender be sent straight to prison without any further trial."

The decision handed down in ex parte Caborn-Waterfield was reaffirmed in R. v. Governor of Pentonville Prison and another, Ex parte Zezza.[180] And it may be argued, since the Canadian Extradition Act is based on the English statute the Act by the use of the term "contumacy" is meant to indicate the judgement rendered in default of appearance a concept that appears in the laws of some countries.[181] Thus, Art.2 of the Extradition Act of Canada by the terms 'conviction' or 'convicted' is only meant to include 'judgement itératif défaut,' whereas 'judgement par défaut' is to be considered within the meaning of the term accused or, in other words, the Extradition Act of Canada does include the concept of ' trial in absentia' within the meaning of the terms 'conviction' or 'convicted'. Author La Forest is of the opinion that[182]

> " Conviction is no less a conviction because it was obtained under circumstances that might be considered a violation of natural justice in Canada; the judge cannot go behind the conviction in this way."

However, if United Kingdom is followed the ' trial in absentia' does not amount to a final condemnation without a appeal.[183]

Nevertheless, it is not necessary that states follow the same practice as cases are decided according to their own merit and in accordance with the legislation of the state concerned. For example, in United States Ex. Rel Argento v Jacobs Et AL (1959),[184] where the accused convicted in absentia of murder, was subject to extradition at the request of the Italian Government by the decision of the United States Commissioner. Upon appeal the District Court of Ohio, held,[185]

> " While this procedure of trial of a defendant, in absentia, on a criminal charge, particularly one as serious as murder, does not comport with our ideas of justice or fairness, it must be remembered that petitioner is an Italian national and alleged to be a fugitive from that country. The offense was

> committed in Italy and is governed by Italian law which permits the trial of a criminal case in absentia."

However, he was not extradited as there was not sufficient evidence to warrant a reasonable belief that petitioner was guilty of murder in Italy.[186]

The practice resorted to by the United States indicates that the mere plea of trial in absentia does not necessarily preclude the extradition of a convict. And the fact the convict will be put to immediate incarceration seems to be of little importance.[187] ' Trial in absentia is not considered by the United States courts sufficiently extreme a denial of fundamental fairness under universal principles to warrant denial of extradition.'[188] In re Mylonas,[189] (1960), the United States District court of Alabama, held,

" ... For the purpose of extradition a person convicted in absentia is treated merely as charged, not as convicted ...," the court further said that,

> " the fact that the accused was convicted in absentia would not preclude his extradition. For the purpose of these proceedings, his conviction in absentia in Greece is to be regarded not as a conviction of, but only as a charge of crime ..."

However, it may be argued that in absence of specific provision in the treaty or national legislation it depends solely upon the discretion of the requested state whether to grant or deny extradition in such cases.

The British practice at present seems to be different as the Criminal Justice Act (1988) in Part 1, Section 3(2) provides that;

> " A person who is alleged to be unlawfully at large after conviction of an extradition crime by a court in a foreign state shall not be returned to that state, or committed to or kept in custody for the purposes of such return, if it appears to an appropriate authority-
>
> (a) that the conviction was obtained in his absence;..."

This provision of the Act overrules the decision rendered in ex parte Caborn-Waterfield[190] and ex parte Zezza.[191]

On the other hand, the practice in the United States is different as compared to that of the United Kingdom. In United States, conviction in absentia is regarded not as a conviction but only as a charge of crime and where the requesting state produces sufficient evidence as to the criminality, the request is usually granted.

b. **STATUTE OF LIMITATION**;

' States, under this principle may decline the request for an extradition, if immunity from prosecution or punishment has been acquired by the person sought after, under the law of prescription. A statute of limitation inevitably protects an alleged accused or a convict from long delayed prosecutions.'[192] However, problems arise when the period mentioned are not the same in the statutes of the requested and the requesting state. Different opinions are to be found as to the applicable law in such cases i.e., whether to apply the statutory provisions of the requesting state or that of the requested. One author comments,[193] " the majority of the text writers hold that the period of prescription should be determined by the law of the requesting state alone ...." The proposition of the text writers seems plausible however, the problem inherent in the application of this proposal is, how can a requested state possibly grant extradition of a person sought after when such a request has become time barred by its own laws? Thus, " the majority of treaties on this point maintain that the question should must be settled in accordance with the law of the requested state."[194] The Harvard Draft Convention[195] states that ' the law of the requested State is given importance in treaties and statutes, the reason being that the person claimed should not be robbed of his asylum, if to do so would subject him to prosecution should circumstances considered unjust in the requested state.'[196] The Harvard Draft on the other hand, presents the argument put forward by adherents of both ideas about the applicable law. Those supporting the laws of the requesting states, say,[197]

> " The requesting State's law should alone determine whether or not immunity from prosecution or punishment has been acquired because the offense serving as the basis of the extradition request was committed in violation of that law and is punishable by it. It is to the interest of the requesting State to have a crime committed against its laws and disturbing its social order prosecuted and punished. The requested State's interests are sufficiently safeguarded by the provisio that no extradition need or should be granted if prosecution or punishment is barred by lapse of time according to the law of the requesting State, under which he is to be tried. The offender should not be permitted to escape punishment merely because the statute of limitation is shorter in the requested State. Moreover, in

> almost every country the running of the statute of limitation may be interrupted by certain events and it would be difficult to find justification for applying the requested State's law as to such interruptions with respect to acts or events occurring outside its territory and in no way affecting its interests."

Whereas, those supporting the laws of the requested state, say,[198]

> " The requested State law should, from the point of view of the requested State, determine whether or not immunity from prosecution or punishment has been acquired, because of the generally accepted principle that extradition may be granted only for acts which are punishable as well by the law of the requested, as by that of the requesting State; and the requested State is primarily interested in examining the request in the light of its own laws, assuming that the requesting State will not make a requisition if prosecution is barred by its own laws. Once prosecution or punishment is barred by lapse of time under the law of the requested State, the situation is analogous to that where the act done is not a crime under its laws and one of the essential conditions of extradition is lacking. The requested State can not be expected to abdicate its right to determine according to its own laws, including the statute of limitation whether the conditions under which extradition may or should be granted or present,"

in view of the arguments presented above, it seems difficult to assess the reasonableness of the law to be applied in such cases. Furthermore, the Restatement states in Section 476 that,[199]

> " Under most international agreements, state laws, and state practice:
>
> " (1) A person sought for prosecution or for enforcement of a sentence will not be extradited ...
>
> " (d) if the applicable period of limitation has expired."

The Restatement respects this principle; however, it fails to indicate the applicable law in such cases.[200] Thus it may be said that the individual cases are to be interpreted in harmony with the relevant provision of the treaty. But most of the treaties make provisions as to the applicable law. For example, the Extradition Treaty concluded between Canada and the United States (1971),[201] it is provided in Art 4(ii) that,

> " Extradition shall not be granted ...;
>
> (iii) when the prosecution for the offense has become barred by lapse of time according to the laws of the requesting state."

" This provision is of little importance as regards extradition from Canada since Canadian offenses are rarely subject to limitation provisions."[202]

Similar provision is to be found in Art.V(1)(b) of the Supplementary Treaty concerning the Extradition Treaty[203] between the United States and United Kingdom (1985). The European Convention on Extradition (1953)[204] however, takes into consideration the provisions of the laws of both the states, as provided in Art.10;

> " Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment."

However, in accordance with the provisions of various treaties[205] the applicability of this principle may be classified as;[206]

> (1) Under some treaties the applicable law is that of the requesting state;

> (2) Under some treaties the applicable law is that of the requested state; and
>
> (3) Under some treaties extradition is precluded if either state's statute of limitations has run.[207]

And, states do accordingly adhere to the provisions of the treaty thus, in Re Romaguera De Mouza, (1952),[208] it was held by the Federal and Cassation Court of Venezuela, on July 23, 1952,

> " that the extradition request must be refused. The court found on examination of Art.III[209] of the treaty and pertinent provisions of the Penal Code that extradition could not be granted where the time elapsing between the commission of the alleged offense and the submission of the extradition request exceeded the statutory limit for that offense in the state of asylum."

Similarly in Public Prosecutor v. Muller, (1965),[210] where, 'the Swiss authorities had requested the extradition of the appellant from Belgium and issued a warrant for arrest on charges of fraudulent conversion and fraud. An order had been given by the Belgian court for the execution of that warrant. Muller appealed against that order, on the ground that, under Belgian law, prosecution for the offense charged was now time barred.'

The Belgium, Court of Appeal of Brussels on 17th September, 1965, said that;[211]

> " Since prosecution is barred, under Belgian law, in respect of the offenses on which the warrant in dispute is based, this warrant cannot be executed in Belgium."

However, in Lazzeri v. Schweizerische Bundesanwaltschaft, (1961),[212] it was held by the Swiss Federal Tribunal that;

> " Art. 4 of the Extradition Treaty [213] provides that extradition shall not be granted if the prosecution or execution of a sentence is time-barred according to the law of the requested state. As the Federal Tribunal has recognized in recent case law, extradition must also be denied where prosecution or execution of sentence are time barred according to the law of the requesting state,"

in this case although the Treaty provided for non extradition of the accused if the offense was time barred by the law of the requested state, the decision by the Swiss Federal Tribunal indicates taking into consideration the provision made by the laws of both the states.

Apart from the problem of the applicable law, the provision of statutory limit seems to pose further problem when the extradition law is to have retroactive effect, for example, in Paucksch v. Public Prosecutor (1973),[214] where 'the accused Paucksch whose extradition had been granted applied to the District court of the Hague for an injunction preventing his surrender by the state of the Netherlands, contending that extradition would be contrary to Art. 9(i)(e) of the Extradition Act because the right to bring a prosecution for offenses committed in 1968 and 1969 was statute-barred. Under the laws in force at the time when the offenses were alleged to have been committed, illegal trade in amphetamines was only a petty offense, in connection with which proceedings had to be brought within two years. Since the Supreme Court had not given an express opinion on that point, it was the Minister who should in the last instance have weighed extradition against Art.9(1)(e) as interpreted above. Otherwise the Minister would commit a tort by acting in contravention of the Extradition Act. The President of the court refused Paucksch's request and he appealed to the Court of Appeal of the Hague, contending that the President of the court had wrongly decided (1) that the Supreme Court had already examined the question of limitation; (ii) that reliance on limitation was unfounded; and (iii) that the Minister had not committed a tort by approving the extradition.'

The Court of Appeal held;

" The appeal was dismissed, it was said in the judgement that;

> " ... The appellant's view that his extradition could not be allowed on the grounds of 9(1)(e) of the Extradition Act because the offenses for which extradition was requested had been committed in 1968 and 1969, and amounted at that time to petty offenses. Therefore the right to prosecute in the Netherlands lapsed after two years, according to Article 70(1)(1) of the Penal Code.
>
> Since in the Supreme Court's opinion, the question of the required double criminality for the offenses for which the appellant's extradition had been requested had to be examined against the laws in force both at the time of the request for and the decision on extradition, it would seem necessary also to examine the question of whether the right to bring a prosecution on the facts in this case had lapsed in this country according to the Dutch laws in force at the time of the extradition proceedings which provided for a limitation period of twelve years for the offenses in question, since they now amount to serious offenses punishable by a term of

> imprisonment not exceeding six years.
>
> Since the appellant's view can not be accepted, the second and third objections must fail, while the first objection, even if it could be accepted, could not result in cassation of the contested decision ... "

The Dutch practice as indicated by the decision of the Dutch Court of Appeal manifests that, the statute of limitation is to be decided on the basis of the provisions in force at the time of the request and not on the basis of the provisions in force at the time of the offense. Whereas, in case of certain international crimes[215] such as war crimes and crime against humanity, it has been the object of the United Nation's Convention,[216] that there should be no statute of limitation bar to extradition. For example, the Convention on Statutory Limitations[217] in Art. I provides;

" No statutory limitation shall apply to the following crimes, irrespective of the date of their commission;

(a) war crimes ...[218]

(b) crimes against humanity ...[219]

Similarly Art. II of the Convention provides that;

> " If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

And Art. IV of the Convention urges State Parties to adopt measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes mentioned in Art. I and II above.

The provision of statute of limitation though an important condition in the law of extradition seems to be in need for a change. This author is of the opinion that statutory limitation should not be made applicable to serious crimes, especially to acts of terrorism. Thus extradition treaties concluded between states could include a stipulation specifying offenses (like the recent treaties concluded between some states which specify the offenses that are not considered as political)[220] not protected under this principle. This type of provision in extradition treaties in turn will allow states to surrender offender(s) charged with such offenses even if the statute of limitation has expired in the requested state.

4. GROUNDS RELATING TO THE PENALTY AND THE PUNISHABILITY OF THE RELATOR;

Request for an extradition, under this principle may be denied on the following grounds;

(a) Amnesty and Pardon;

(b) Double Jeopardy (Ne Bis In Idem); and

(c) Death Penalty:

a. AMNESTY AND PARDON;[221]

Amnesty and Pardon are two different bases upon which extradition may be denied. In case of extradition barred by statutory limitation the request for extradition is denied, however, the criminality is not extinguished whereas in case of ' Amnesty' or ' Pardon' criminality is extinguished.[222]

' Amnesty' and ' Pardon' are acts of executive and legislative clemency. The former occurs after the guilt is determined either before or after the penalty is executed'.[223] Its effect is to,[224]

> " ... remove the consequences of the guilty finding whether it be with respect to the execution of the sentence or other ancillary sanctions. It restores the legal status of the convicted person to that of a person not convicted."

Bedi, is of the that view,[225]

> " The same condition prevails after the declaration of amnesty as it puts an end to certain actions which are not described as crimes or offenses thereafter, and the people indicted on those charges are free from any imputation attaching to their reputations for the performance or omission of certain acts."

The views as mentioned above indicate that an act of granting ' Amnesty' apart from setting the offender free, obliterates the criminality of an offender. Some treaties provide that extradition shall not take place if the person claimed has been pardoned or has had the punishment remitted in the requested, requesting or in a third state in respect of the crime or offense for which extradition is requested. However, these provisions of the treaties are more appropriately related to the issue of " Non Bis in idem" and have been discussed in the following unit.[226]

The application of these terms on the other hand are confusing as this concept may very well operate if the offense is limited to the criminal jurisdiction of one state, but where the criminal jurisdiction of more than one state is involved certain complex problems may arise in the absence of any uniform principle. As Bedi says,[227]

> " ... in the absence of any supervising authority over states, it is difficult to state whether the requested state should determine acquisition of immunity from prosecution and punishment according to its own laws or according to that of the requesting state or to both.'

Most treaties provide that states may refuse to extradite a person who has been granted pardon in the requested or the requesting state in respect of the crime for which the request is made. Thus, a problem may arise where the person was granted pardon by a third state i.e., the one other than the requested or the requesting state. For example in the case of Mahmoud Issa Mohammad,[228] who had been convicted of manslaughter in 1970 and sentenced to 17 years in prison by the Greek court for his part in 1968 terrorist raid at Athens airport. Mahmoud was released after serving about a year in prison, when a group of Palestinian terrorists hijacked an Olympic Airways plane in 1971 and demanded the release of Mahmoud from the Greek authorities.

The hijackers threatened to blow up the Greek airliner unless seven Arabs including Mahmoud were released. The demand was met by granting pardon. After which Mahmoud entered Canada. The Canadian Government says Mahmoud lied on his application for landed immigrant status in January 1987 when he stated that he had never been a member of terrorist organization, convicted of a criminal offense, or refused admittance to another country. Mahmoud on the other hand, has testified that he did not lie as he was ' pardoned' by the Greek Government.'[229] But, Christos Mylonopoulos, an Athens lawyer and associate professor of law at a Greek University, told the hearing a pardon in Greece can be used to reduce or dismiss punishment for an offense. But it does not extinguish penalty or the decision, it only requires the administration to release the offender. He said the conviction remains.[230] Whereas, the Constitution of Greece 1952 in Art.39 provides,[231]

> " The king[232] shall have the right to pardon, and to commute and reduce sentences pronounced by the courts of law, except in cases governed by the provisions of the law regarding minsters. The king shall have the right to grant an amnesty only in cases of political crimes and under the responsibility of the government."

Statement of professor Christos Mylonpoulos and the provision of the Constitution of Greece seems to be in contradiction. The provision of the Constitution nowhere mentions that commutation and reduction of sentences is to be acquired by means of pardon. But, the " immigration Department adjudicator of Canada, Ed Mc Namara preferred government arguments and testimony from Greek officials that the pardon allowed Mahmoud out of jail without serving his sentence but did not absolve him."[233] Matter in a case like this becomes more complicated when there is a request for extradition by more than one state. As different states may try to claim jurisdiction over the same incident on the basis of different jurisdictional principles.[234] Assuming, that the pardon granted by Greece in this case, had the effect of absolving the criminality of the offender (but the situation in the present case is reverse as stated by professor Christos Mylonpoulos and the decision of the immigration adjudicator), several questions may arise viz.;

1) Does the conviction and subsequent pardon of an offender by a state, where the incident took place, absolve that offender of his/her criminality in respect to other states?

2) what is the status of the accused in international extradition law, when the accused is present in a third state, i.e., outside the territory of a state granting pardon, and extradition request is made by other states claiming jurisdiction on different basis?[235] and

3) Can he/she be extradited upon such a request? the accused being already tried, convicted and subsequently pardoned by the state where the incident took place.

These questions stated above, do in fact raise some complex issues in absence of a universally recognized legal meaning of the terminology 'pardon' in international extradition law. However in view of the statement that, 'conduct which affected more than one state can be considered as a independent violation because each state is a separate sovereign,'[236] it may be argued that, it is doubtful a state will deny extradition if the person sought after had been granted amnesty or pardon by a state other than the state requested or requesting.

In the case of Mahmoud, the pardon granted by the Greek government was under coercion i.e., to ensure the safety of the hostages. Here again it may be argued that, does a pardon granted under coercion carry the same effect as the one granted under normal circumstances ? Moreover, the matter is more complicated if one has to interpret the meaning of 'pardon' according to its applicability in the municipal system of the state concerned. As stated by professor Christos Mylonopoulos the term ' pardon' as used in Greece can be used to reduce or dismiss punishment for an offense but the conviction remains. It may be said that, this is a typical instance of difficulties in assessing terminology of language in absence of a uniform meaning of the term to which states are to abide by.

However as far as the Canadian practice is concerned, La Forest is of the opinion that;[237]

> " ... It seems doubtful that Canada would refuse to surrender a person pardoned in the requesting state because this would require trying that point. A person who had been pardoned in Canada would usually

> be protected by the provision that he had already been tried and punished, but it might be difficult to avoid surrender where this was not the situation, for there would be a prima facie case as required by the Act and treaties."

In view of the above statement it may be argued that had any of the affected state having an extradition treaty with Canada requested for Mahmoud's extradition, it is doubtful that the extradition request would have been denied on the ground of pardon.

b. DOUBLE JEOPARDY OR NE BIS IN IDEM;

' Ne bis in idem' is a rule which opposes itself to practices both municipal and international, which would subject a person to repeated harassment for the same act or acts.'[238] Thus, in order to protect a person from repeated punishment provisions are made in extradition treaties to prevent such repetition. And according to the provisions found in different extradition treaties they may be classified as;

(i) when the person sought has been prosecuted or acquitted by the requested state;

(i) when the person sought has been prosecuted or acquitted by the requested or the requesting state;[239] and

(iii) when the person sought has been prosecuted or acquitted in the territory of the requesting or requested or of a third state.

(i) The provision of these types of treaties expressly provide that the requested state will not extradite a person ' if

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prosecution in the requesting state would be or was, in contravention of an applicable principle of double jeopardy,'[240] For example, the *Extradition Treaty* concluded between the United States and Italy (1983),[241] provides in Art. VI that;

> " Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed by the Requested Party for the same acts for which extradition is requested."

Similarly, Art. 4(1)(i) of the 1971 Canada-U.S. *Extradition Treaty*[242] states that;

> " (1) Extradition shall not be granted...
> (i) when the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested state for the offense for which his extradition is requested.

Provisions to similar effect are to be found in the extradition treaties concluded between Belgium - Brazil (1953),[243] Belgium -Federal Republic of Germany (1956),[244] Israel - Italy (1956),[245] Roumania - Poland (1962).[246]

(ii) Treaties under this classification deny extradition if the person sought after has already been prosecuted in either the requested or the requesting state. For example, Art. 8(2) of the *Extradition Treaty* between Israel and Austria of (1961)[247] provides,

> " Extradition shall be refused;
> (2) If, for the same offense, the person claimed has already been convicted and has served his sentence, or has been acquitted, in either the requested or the requesting state;"

(iii) Treaties under this classification have broader application as compared to others mentioned earlier, as the treaties under this classification tend to incorporate the concept of ' third state' apart from the requested and requesting state. For example, the Extradition Treaty concluded between United States and the United Kingdom, provides in Art. V(1)(a) that,[248]

> " Extradition shall not be granted if (a) the person sought would, if proceeded against in the territory of the requested party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third state;"

The Extradition Agreement between Canada and Israel (1967),[249] makes similar provision in 4(b) which provides, " A person claimed shall not be extradited if (b) he has already been tried and acquitted or punished anywhere for the act for which his extradition is requested;"

The classifications mentioned above play an important part when it comes to judging the validity of defense based upon ' Ne bis in idem' for example, a person may not be able to raise the defense of double jeopardy - if he/she is being prosecuted as such in the requesting state and the treaty governing the extradition process falls under classification no. (i), as treaties under this classification provides " that extradition is not to be ordered where a fugitive has been previously tried in the requested state, the raising of autrefois acquit or convict where the fugitive has been tried in the requesting state is implicitly ruled out."[250] In the same way, such a plea is not entertained by the courts if the person sought has been tried and convicted or acquitted by a third state and the treaty governing the extradition process falls under classification no(i) and (ii).

As far as the applicability of this principle is concerned, professor Bassiouni is of the opinion that;[251]

> " The application of this principle has been, different in the framework of various legal systems. Furthermore, there has always been a question as to its applicability between legal systems. The reason has been that conduct which affected more than one state can be considered as an independent violation because each state is a separate sovereign . As a result each state seeks its satisfaction independently of the other affected state and irrespective of whether the offender is placed in double jeopardy."

Though it is true, there has always been a question as to its applicability between legal systems, however the only protection afforded to an offender against such prosecution is through the provision of a treaty[252] concluded between states. Apart from the provisions stipulated in treaties there seem to be no other means by which an offender may be protected from such prosecution. Although, it may seem possible that in cases like this i.e., where there is no provision in the treaty- protecting an offender from double jeopardy, the domestic law of the requested state may afford such protection. However, it is difficult to say whether the requested state will be willing to apply its domestic law in such cases, thus, giving extraterritorial effect to its law for the protection of an offender. In the case of Schmidt v.

Queen et al (1987),[253] the appellant was sought by the state of Ohio, on a charge of child stealing. The appellant had previously been charged and acquitted on a United States federal charge of kidnapping. Following the hearing, the appellant was committed for extradition and her application for habeas corpus was dismissed.

Her appeal to the Ontario Court of Appeal was also dismissed. On further appeal the Supreme court of Canada, held the appeal should be dismissed.

The appellant's major argument related to S 11(h) of the Canadian Charter of Rights and Freedoms,[254] which provides,

> " 11. Any person charged with an offense has the right
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;"

Counsel for the appellant submitted that the child stealing charge is substantially the same as the kidnapping charge and that, consequently, the appellant is protected from being tried under the child stealing charge under S11(h) of the charter.

La Forest J. giving judgement upon this argument said;[255]

> " In particular the charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted.
>
> These propositions must, ..., be kept firmly in mind in examining the right protected by S.11 (h). The right is that of a person charged with an offence not to be tried for the offence again if he or she has already been finally acquitted of the offence.

> The Government of Canada, to which the charter applies, is not trying the fugitive. An extradition hearing, ...,is not a trial ... To repeat, S.11(h) was not intended to be given extraterritorial application so as to govern criminal processes in another country. It was intended to govern trials conducted by the governments of this country mentioned in S.32. Here no trial is being conducted by the Government of Canada. If a trial is to be held, it will be conducted by a foreign government in a foreign country for an offence under its laws."

Thus, S.11(h) of the charter was rendered inapplicable in extradition hearing. The author however, is of the opinion that protection of the Charter should be afforded in extradition hearings especially in cases where the request might seem to be in gross violation of the principles of fundamental justice.[256]

The principle of ' Ne bis in idem' is difficult to apply with uniformity in absence of an internationally accepted doctrine of criminal justice. The problems inherent in this principle as summed up by profess Bassiouni are as follows;[257]

> " 1) will punishment in one state for a given conduct satisfy another state if the same conduct is also punishable under its laws?
>
> 2) Will acquittal by one state for a given offense satisfy another state if the same conduct is also punishable under its laws?
>
> 3) will prosecution or any of its preceding stages preclude one state from prosecuting a person for conduct claimed criminal under both laws?
>
> 4) will the state seeking to prosecute or punish a person already prosecuted or punished by another state for the same conduct consider itself bound by the prior prosecution or punishment, or in reliance upon a technical difference as to the offense charged will it deem itself free to pursue that same offender?

> 5) will the inquiry be made as to the entirety of a given criminal transaction or will it be made as to each chargeable offense arising out of the respective laws of each state?"

Considering the principle of sovereignty according to which states are free to choose their own systems and laws to be applied within their jurisdictions, the problems as mentioned by prof. Bassiouni are in fact complex especially in absence of internationally accepted doctrines of criminal justice. However, states as separate sovereign entities enforce their own laws if the offender is caught within one's jurisdiction regardless of the fact that, the offender may have already been prosecuted or acquitted for the same conduct by another state. Thus in E v. Police Inspectorate of Basle (1979),[258] where ' the appellant, a German national had been imposed additional penalty in Switzerland for an offence committed there for which he had already been punished in Federal Republic of Germany. In proceedings before the criminal court of the Swiss Federal Tribunal, he contended that the law of Nations prohibited the punishment of a person twice for the same crime. The court of cassation rejected this argument. The Swiss, Federal Tribunal (criminal court of cassation), in its judgement held,[259]

> " (3)... the argument is unfounded. Accepting that every state itself defines the field of application of its criminal laws and the competence of its courts, it often happens that two states claim the right to exercise jurisdiction over a single factual situation. Such is always the case if the state where an offence was committed exercises jurisdiction on the basis of the generally recognized principle of territoriality whilst a

> second state considers that it is competent to prosecute on the basis of another connecting factor. The law of nations does not recognize any rule which would prevent the criminal authorities in the two states from exercising jurisdiction over the same offence. In other words there is no rule in such circumstances excluding concurrent jurisdiction in criminal proceedings."

Apart from the rule of ' Ne bis in idem', states may decline to extradite the person sought if that person is being proceeded against by the Requested Party for the same acts for which extradition is requested. For example, both the Extradition Treaty between Canada and United States (1976),[260] and the Extradition Treaty between Italy and the United States (1983)[261] contain this provision. The Extradition Treaty between Italy and United States (1983) provides in Art. VII that,[262] "_ Extradition may be refused if the person sought is being proceeded against by the Requested Party for the same acts for which extradition is requested." Similar provision is to be found in Art. 8 of the European Convention (1957),[263] which reads as follows;

> " The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offenses for which extradition is requested."

Thus in the case of Achille Lauro[264], Italy was competent to start legal proceedings against the hijackers as she was the flag state.[265] In so far as the request for extradition of the hijackers by the United States is concerned it will depend upon charges brought against the hijackers in Italy whether the " Ne Bis In Idem" principle will apply or not.[266]

The view as stated in the Extradition Treaty between Italy and the United State and in the European Convention is endorsed in several bi-partite treaties and statutes of various states.[267] States on the other hand may defer extradition ' if the person sought after is being proceeded against or is serving a sentence in the territory of the requested state for an offense other than that for which extradition has been requested.'[268]

c. **DEATH PENALTY**;

States whose national laws prohibit the death penalty reserve the right to deny extradition of an accused or a convict, where it deems that the person being sought after may be sentenced to death for the offense. Specific mention is made in treaties relating to the right to deny extradition in case of death penalty. For example, Art. 11 of the European Convention, (1957)[269]provides;

> " if the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out."

Similarly, the Extradition Treaty concluded between Canada and the United States in 1976[270] provides in Art. 6 that;

> " When the offense for which extradition is requested is punishable by death under the laws of

> the requesting state and the laws of the requested state do not permit such punishment for that offense, extradition may be refused unless the requested state provides such assurances as the requested state considers sufficient that the death penalty shall not be imposed, or if imposed, shall not be executed."

Provisions to similar effect are to be found in the extradition treaties concluded between United States and Italy (1983);[271] United States and Israel (1962);[272] United States and United Kingdom (1972);[273] etc. Thus according to the provisions of these extradition treaties, contracting states have a discretion to refuse extradition in absence of an assurance that the death penalty will not be carried out by the requested state, provided that the law of the requested state do not permit such punishment for that offense. However, if the offense is punishable in both the states by death penalty such an offense is deemed to be extraditable. For example, Art. III (1) (a) of the Extradition Treaty between United States and the United Kingdom 1972, provides,[274]

> " (1) Extradition shall be granted for an ... offense , if;
>
> (a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty."

This provision is hardly of any practical significance as United Kingdom has virtually abolished death penalty but retains it so as only to apply in case of treason and desertion in face of enemy both of which are not extraditable.[275] But, in cases where death penalty is prohibited by the laws of the requested state, normally, conditional extradition is made when sufficient assurance is provided by the requesting state that death penalty will not be carried out. For example, in Re Candino de Pepe (1956)[276], Italy sought the extradition of Rosa Candino de Pepe from Argentina, on charges of felonious homicide in connection with the deaths of her husband and of a priest and of complicity in the concealment of corpses. The lower federal court granted the request for extradition and Candino de Pepe (Petitioner) appealed. It was held by the court that; " extradition request must be granted."

The court further said that,[277]

> " this court affirms the lower court's decision to grant the request for the extradition of Rosa Candino de Pepe to Italy ... but only on the condition, which must be agreed to through the diplomatic channel, that in the event of her conviction she will not be subject to capital punishment."

The court in this case observed, although the Treaty did not require that the requesting state should agree to apply the minimum sentence in the event of the conflict between the laws of the two states. However, in view of the abolition of death penalty in Argentine Penal Law which came into force after the Treaty was enforced, the Argentine court sought assurance from Italy that if convicted she would not be put to death. Similarly, in the case of Viaux - Peccate v. State of the Netherlands, (1978),[278] where,

> " France had requested the extradition of Viaux Peccate, a French national accused of committing

> offenses which carried the death penalty under French Law. The District court ... and the supreme court declared extradition admissible and on 5 May 1978 the State -Secretary of Justice decided to allow extradition. Viaux-Peccate appealed to the Judicial Division of the Council of State, at the same time requesting that extradition be stayed. The request was refused ... whereupon Viaux - Peccate requested the District court of the Hague to grant an injunction ordering extradition to be stayed, primarily until the Judicial Division had made a decision and alternatively until the respondent had made known the assurances or promises received from France, and until there was sufficient evidence for the respondent to believe that the French state would not carry out the death penalty on the plaintiff."

The District court of the Hague refused the injunction. The court further said,

> " The appellant contends ...., that the respondent may not extradite him until assurances have been received from France that, should the appellant be sentenced to death, this penalty will not be carried out - even though nothing concerning this matter is included in the France-Netherlands Extradition Treaty of 1895[279]...
>
> In our provisional opinion this contention must fail. The court cannot see, nor has the appellant produced any evidence of, any rule of customary international law binding on the Netherlands which goes further than the rule laid down in European Convention on Extradition, Article 11."[280]

However, in the case of Joseph John Kindler and M. John Crosbie,[281] Minister of Justice Attorney General of Canada (1987), in which, ' Kindler had been convicted and sentenced to death for offenses of first degree murder, kidnapping and criminal conspiracy to commit murder in Pennsylvania, no such assurance was sought by the Canadian Government when Kindler was committed to be extradited.

In a decision dated January 17, 1986, the Minister of Justice concluded that Canada should surrender the Appellant without seeking any assurance from United States authorities that the death penalty would not be imposed or, if imposed, would not be carried out in the Appellant's case.

The Appellant appealed to the Federal Court of Appeal for review of the Minister's decision, but the application was dismissed on June 5, 1986, on the basis that the decision sought to be reviewed was not required by law to be made on a judicial or quasi-judicial basis.'[282]

The Appellant then commenced proceedings in the Trial Division under S. 18 of the Federal Court Act[283] seeking certiorari, mandamus and other relief in respect of the Minister's decision. The application was dismissed by Rouleau, J., on January 21, 1987, from which order the Appellant appealed.

> " The questions on this appeal are whether the Learned Judge of the Trial Division was correct in his conclusions that:
>
> a) the proceedings leading to the decision of the Minister of Justice were taken in accordance with the principles of fundamental justice guaranteed by S.7 of the Canadian Charter of Rights and Freedoms;[284] and
>
> b) the decision of the Minister of Justice did not, in its effect , authorize the imposition of cruel and unusual punishment contrary to S.12 of the Charter.[285]"

The Attorney General of Canada put forth his argument as follows;[286]

> " ... in assessing whether the possible execution of the death penalty would be " simply unacceptable by Canadian standards, it must be recalled that

under our Constitution the right to life is not absolute:" The right under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under S.1."[287] In the context of S.7 of the Charter, it is recognised that there may be deprivation of life (even without recourse to an override of the right pursuant to S.33(1) of the *Charter*) so long as such deprivation accords with fundamental justice: " The principles of fundamental justice, on the other hand, are not a protected interest, but rather a *qualifier* of the right not to be deprived of life, liberty and security of the person."[288]

In this regard, this court has expressed the view that the guarantees of the *International Covenant on Civil and Political Rights*[289] (to which Canada acceded prior to the enactment of *Charter*)" provide a relevant and persuasive source for interpretation of the provisions of the Charter."[290] Accordingly, it is relevant to note that while Art. 7 of the *Covenant* proscribes " cruel, inhuman or degrading treatment or punishment" Art. 6(2) there of expressly contemplates that " sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime."

In making the point that surrender might, in some circumstances, be inconsistent with fundamental justice, the Supreme court of Canada referred[291] to the decision of the *European Commission on Human Rights* in *Altun* v. *Germany*.[292] There the commission declared admissible a complaint that the applicant would, if extradited to Turkey, face torture, contrary to the express guarantee of Art.3 of the *European Convention on Human Rights*[293] (from which there could be no derogation, even in time of war or there public emergency:)

Accordingly, it may be pertinent to consider the commission's jurisprudence in situations like the present one, where surrender might possibly be followed by the imposition of the death penalty in the requesting state. In *No.10479/83* v. *United Kingdom*, it was not contended that surrender would violate the applicant's Art. 2(1) right to life--which was formulated in qualified terms, like that in the *International Convention* and the *Charter*--but rather that the applicant would, if convicted, be subjected to the " death row phenomenon", that

> is , prolonged uncertainty as to whether the penalty would be carried out. The commission concluded that surrender pursuant to the provisions of the relevant treaty (which was almost identical to Art .6 of the Treaty in the present case) would not infringe the Convention Art.3 right not to be subjected " to inhuman or degrading treatment or punishment," and stated,
>
> " The commission cannot find that the assurances obtained have removed the risk of the applicant being exposed to the death row phenomenon. The assurances do not amount to a legal guarantee that the applicant, if sentenced to death, will have the death sentence commuted. However, in the light of the provisions of Art.2(1) of the convention, which expressly recognises the ending of life through the death penalty following appropriate criminal conviction, such an assurance cannot be expressly or implicitly required by the terms of Art. 3. Just as the terms of Art. 2(1) of the convention do not per se exclude the possibility that the death row phenomenon may constitute inhuman and degrading treatment, they have the further effect the failure to seek a legally binding assurance that a death sentence, if imposed, will definitely be commuted, would not itself constitute treatment contrary to Art. 3."[294]

The Attorney General further argues that,

> " Since the charter itself contemplates that deprivations of life may occur,[295] this court need not enter upon any searching examination of whether the imposition of the death penalty in the requesting state might, in some hypothetical case, be contrary to fundamental justice. If any offense is deserving of the death penalty, it is premeditated murder."[296]

Taking into consideration the decision handed down by the Minster of Justice and the Attorney General's argument it is doubtful that Canadian government would defer the extradition of an accused/convict if he or she were to face death sentence upon return. This approach may be further supported from the case of Charles Ng,[297] where Madam Justice Marguerite Trussler of Alberta court of Queen's Bench in her judgment, after a preliminary hearing said;

> " I am issuing a warrant for the committal of Charles Chitat Ng to the nearest convenient prison with respect to 19 charges, where he is to remain until surrendered to the United States of America."[298]

She thus held the issue was one for the Minister to decide and not for her and refused even to consider the issue. However, this was only a preliminary hearing[299] which means other legal remedies for e.g. applying for a writ of habeas corpus and Appeal are still available to Charles Ng. And, as the Extradition Treaty between Canada and the United States (1976), gives the executive authority of the requested state the discretion as to seek assurance or not, the matter will depend solely upon the decision of the Minister of Justice.

Thus, from the provision of the treaties and the cases observed so far it is submitted that the requested state reserves the right to deny extradition if the national laws of that state prohibits such punishment. The final decision on this matter however depends upon the provisions made by the law of that state or the practice followed by it.

NOTES;

1.M.C. Bassiouni, International Extradition And World Public Order, (1974), at pp. 368-369.

2.S.D. Bedi, Extradition In International Law And Practice, (1966), at p. 165.

3.Supra n, 1 at pp. 368-369.

4.It should be noted, that the international community has not been able to arrive at a universally accepted definition to the offence of a political character; See also, Chapter I at p. 8.

5.See, Chapter I, at pp. 1-2.

6.See, Algeria, Code of Criminal Procedure, June 8, 1966, Art. 698 (2); Argentina, Extradition Act, August 25, 1855, Art. 3(3); Belgium, Extradition Act, October 1, 1833, Art. 6; Brazil, Aliens Act, October 13, 1969, Art. 88; Canada, Extradition Act, 1970, Art. 21(a); Columbia, Code of Criminal Procedure, March 27, 1971, Art. 758; Cyprus, Extradition Act, December 31, 1970, Art. 6(a); Denmark, Extradition Act, June 9, 1967, Art. 5(1); Ecquador, Aliens Act, December 27, 1971, Art. 4(7); Finland, Extradition Act, July 7, 1970, Art. 6; France, Extradition Act, March 10, 1927, Art. 5(2); Federal Republic of Germany, Extradition Act, December 23, 1929, Art. 3; Ghana, Extradition Act, December 15, 1960, Art. 7(2); Great Britain, Criminal Justice Act, 1988, Part I sec. 3; Ireland, Extradition Act, July 19, 1965, section 11 (1); Israel, Extradition Act, 1954, Art. 2(2); Italy, Constitution, December 27, 1947, Arts. 10 (4) and 26(2); Japan, Extradition Act, July 21, 1953, Art. 2(1); The Netherlands, Extradition Act, March 9, 1967, Art. 11 (1); Thailand, Extradition Act, December 15, 1929, Arts. 12(3) and 13(2); Sweden, Extradition Act, December 6, 1957, Art.6; Switzerland, Extradition Act, January 22, 1892, Art. 10:

7.See infra n, 8-9.

8.C.T.S. (1976) No.3.

9.See for example, the Extradition Treaty concluded between United States and Italy (1983), in 24 I.L.M. 1527; United States and United Kingdom (1972), in 28 U.S.T.-T.I.A.S. 8468; Switzerland and France in 139 C.T.S. 378; Argentina and Chile, in 139 C.T.S. 400; United Kingdom and Israel (1962), in 377 U.N.T.S 331; United States and Japan, in 1980 T.I.A.S. 9625; United States and Federal Republic of Germany 1980 T.I.A.S. 9785 etc.:

10.C.V. Wijngaert, *The Political Offence Exception to Extradition*, (1980), Foreword.

11.The term "terrorist" or "terrorism" is not easy to define, and there is no universally accepted definition of either term. For the problems inherent in any effort to define these terms, see Jenkins, International Terrorism: A New Mode of Conflict, in *International Terrorism and World Security* 13 (D. Carlton & C. Schaerf eds. 1975). However, the International Law Association in 1988, at the Warsaw Conference defined terrorism as,

> " ... any act or threat of violence, deprivation of freedom or destruction of property, endangering the life of, or directed against, a person engaged in international communication."

See, Art.III of the *Committee Report of the International Law Association*, Warsaw Conference (1988), at p. 5. See also the Dissents and Supplementary Comments by Members of the Committee, *Id*. at pp. 17-18.

Professor Green is of the opinion that,

> " for practical purposes, terrorism may be defined as the exercise of violence or the threat thereof against an innocent third party, property or institutions by an individual or organization other than the victim,"

in Terrorism and the Courts, 11 *Manitoba Law Journal*, (1981), at p. 333; For more literature on this topic see, *Conference on Terrorism and Political Crimes* 3d. (ed. M.C.Bassiouni 1973); *Terrorism, Political Violence and World Order* (ed. Henry Hyunwook Han 1984); Y.Z. Blumm, Extradition: A Common Approach to the Control of International Terrorism in Narcotic Drugs, in 13 *Is.L.R.* 1978, 194; J.J. Lador-Lederer, A Legal Approach to International Terrorism, in 9 *Is.L.R*. 1974, 194:

12.*Supra* n, 10.

13.See for example, the *Protocol Amending the Treaty on Extradition*, (1988) [hereinafter referred to as the *Protocol*] concluded between Canada and the United States, in 27 *I.L.M*. 422; *The Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Act of Terrorism*, (1988) [hereinafter referred to as the *Supplementary Treaty*] concluded between United Kingdom and the United States, in 24 *I.L.M*. 1105.

14.M.C. Bassiouni, The Political Offence Exception in Extradition Law and Practice, in Conference on Terrorism and Political Crimes, 3d,(ed. M.C. Bassiouni, 1973) at p. 408.

15.[1891] 1 Q.B. 149; For a detailed discussion see Infra n, 48-49.

16.[1894] 2 Q.B. 415; For a detailed discussion see Infra n, 50-52.

17.Harvard Research in International Law, 29 Am.J.Int'l.L., (Supplement), (1935), at p. 113. [Hereinafter referred as the Harvard Draft].

18.See, Garcia - Mora, The Nature of Political Offenses; A Knotty Problem of Extradition Law, 48 Va.L.Rev., (1962), at p. 1226.

19.Supra n, 13.

20.Id.

21.See Infra, at pp. 143-44.

22.Supra n, 10 at p. 106.The definition given by Prof. Wijngaert, incorporates the notion of relative political offence, as any revolutionary act accompanied by the commission of common crimes may fall under category (b). Its application may however, depend upon the practices followed by states.

23.14 I.L.R. 145.

24.L.C.Green, Political Offenses, War Crimes and Extradition, in 11 I.C.L.Q. (1962) at p. 332.

25.The English practice however, is different than the one stated in Re Giovanni Gatti, as may be observed from Schtraks v. The Government of Israel and Others, (1962) in which Viscount Radcliffe, said;

> " In my opinion the idea that lies behind the phrase
>
> ' offence of a political character' is that the fugitive is at odds with the State that applies for extradition on some issue connected with the political control or government of the country. The analogy of ' political' in this context is with the 'political' in such phrases as ' political refugee', ' political asylum', or ' political prisoner'. It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal

> law in its ordinary, what I may call its common or international, aspect. It is this idea that the judges were seeking to express in the two early cases of Re Castioni and Re Meunier when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power; and in my opinion it is still necessary to maintain the idea of that connexion."

In 33 All.E.R. [1962] 529 at p. 540.

In Schtraks, though the English court viewed political as connected with anti-governmental and unconstitutional activity, however, unlike the French court the decision given in Schtraks embodied the concept of relative political offence.

26.Re Ficorilli, Federal Tribunal of Switzerland, (1951), in 18 I.L.R. 345, at p. 345.

27.Id. However, it may be argued that the concept of Relative political offense as such was in practice as early as the beginning of the nineteenth century, which is evident from the Circular of 1841 of the Minister of Justice (discussed in Chapter 1 at p. 17); See also Re Castioni, infra p. 123:

28.Political Offenses in the Law and Practice of Extradition, in 27 Am.J.Int'l.L.,(1933), at p. 248.

29.Foreign Relations, U.S. 1909, at pp. 520-521, cited in Bassiouni, Supra n, 1 at pp. 402-403.

30.Charles L. Cantrell, The Political Offense Exemption in International Extradition; A Comparison of the United States, Great Britain And the Republic Of Ireland, in 60 Marquette Law Review, (1976-1977), at p. 780.

31.22 I.L.R. 528.

32.Id.

33.Id., at p. 529.

34.C.V. Wijngaert, has classified this approach into (1) objective, (2) subjective and (3) mixed. See, Supra n, 10 at pp. 120-126.

35.See in Re Giovanni Gatti, Supra n, 23 at pp. 145-146.

36.For the text of the Law, See, 29 Am.J.Int'l.L., (Supplement), (1935), at p. 380. Although the provision of Art. 5(2) does not differentiate between the concept of ' purely political offense' and ' relative political offense', it was made clear in the case of Gatti, that ' related political offense' can hardly find any room to operate in the French law.

37.See infra,at pp. 138-143.

38.Supra n, 10 at p. 126.

39.The Political Offense Exception As Applied in French Cases Dealing With The Extradition Of Terrorists, 1983 Michigan Yearbook of International Legal Studies, 209 at p. 211.

40.The court in Ficorilli considered that a common offence having a predominantly political character is a relative political offence, Supra n, 26 at p. 345; See also, Re Pavan (1923) Annual Digest 347; In re Peruzzo 1952 I.L.R. 369; In re Ockert (1933-1934) Annual Digest 369; In re Comporini (1923-24) Annual Digest 283; In re Vogt (1923-24), Annual Digest 285.

41.Supra n, 29.

42.Cour d' appel, Paris [1953] 2 GAZ. PALAIS 113., cited by Thomas E. Carbonneau, Terrorist Acts - Crimes or Political Infractions ? An Appraisal of Recent French Extradition Cases, in 3 Hastings International and Comparative Law Review, (1979-80), 265 at p. 277.

43.Thomas E. Carbonneau, Id.: See also, 20 I.L.R. 370.

44.Cour d' appel, Paris [1967] Juris - Classeur Periodique, la Semaine Juridique [J.C.P. II] No.15274; cited in Thomas E. Carbonneau, Id., at pp. 277-278.

45.Conseil d' etat, 105 J.Dr.Int'l. 73, 76 (1978); [1977] D.S.Jur. at 695, 699; cited, in Thomas E. Carbonneau, Id., at p. 279.

46.But the decisions by the French courts in Re Holder and Kerhow; cited in E. Mc Dowell, Digest of United States Practice in International Law, (1975), at p. 168; and the case of Abu - Daoud; in 74 I.L.R. 453; seem to ignore the notion that political offense exception should not be applied to cover the acts of terrorism. The decision in the case of Abu - Daoud was severely criticised by the Western governments.

47.Wijngaert is of the opinion that, this theory derived its name from the definition given to the term political crimes by Stephen J., in his work II History of the Criminal Law of England, (1883), at pp. 70-71), Supra n. 10 at p. 111.

48.[1891] 1 Q.B. 149.

49.Id., at p. 156.

50.[1894] 2 Q.B. 415.

51.Id., at p. 419.

52.For anarchists are considered to be the enemy of all Governments as their efforts are directed primarily against the general body of citizens. Id., at p. 419.

53.Id.

The concept of political offence, was given a broader consideration by the English courts in the case of R v. Governor of Brixton Prison, ex parte Kolczynski, (1955), also known as the Polish seamen's case. Cassel J., in this case considered that,

> " The words ' offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when Castioni's case was decided."

And Lord Goddard C.J. was of the opinion that,

> " the evidence, ... showed that these men while at sea found that a political officer was over hearing and recording their conversations and keeping observations upon them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding or at least expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for a political offence and in my opinion, therefore, the offence had a political character." [1955] 1 Q.B. 540, at pp. 549-550.

Lord Goddard, thus gave a wider and generous meaning to the concept of political offence, taking into consideration the situation prevalent in Poland at that time, which he stated could be done without in any way encouraging the idea that ordinary crimes which have no political significance will thereby be excused.

Though, Lord Goddard gave this wider and more generous meaning to the concept of political offence, the meaning given to the concept in Castioni, has not been rejected. The United States and the Canadian courts have adopted the language used in Castioni. For example for United States see, In Re Gonzalez (1963), in 217 F.Supp. 717; As for the Canada see, Re State of Wisconsin and Armstrong, (1973), in 32 D.L.R. (3d.) 265; This case has been discussed at Chapter IV, p. 137.

Professor L.C.Green comments that, " Kolczynski has been expressly rejected in the United States," see, Immigration, Extradition, and Asylum in Canadian Law and Practice, in Canadian Perspective on International Law and Organization (edited by Macdonald, Morris and Jhonston) 1974, 243 at p. 281. See Karadzole v. Artukovic (1957), 247 F.2d. 198, at p. 203; United States ex rel. Karadzole v. Artukovic (1959), 170 F.Supp. 383, at p. 392;

The English court, reaffirmed the concept enunciated in Castioni in Schtraks v. The Government of Israel and others, (1962), for further discussion see Supra n, 25.

And the Court of Appeal (Ghana) applied the principles enunciated in Castioni, Meunier, and Kolczynski, in the case of the State v. Schumann (1966). In this case, Schumann a German national resident in Ghana, was sought by the German Government on the charges of the mass murder and for conducting experiments in mass sterilization of the Jews. The Court of Appeal, rejecting the request for the writ of habeas corpus by Schumann said in its judgement,

> " It is clear beyond any argument that the appellant's case is not covered by these principles. It is not his case that the poor helpless lunatics at the Munsungen Asylum or the Jews at Auschwitz had rebelled against the Nazi ideology and had thereby created some form of political disturbance which needed quelling, nor indeed does he claim to have committed the offence charged with a view to avoiding political persecution or prosecution."

In other words the exception cannot be pleaded to excuse conduct done in accordance with government policy. See 39 I.L.R. 433 at pp. 434-437. The court used the term ' these principles' in this case in reference to the principles enunciated in Castioni, Meunier, and Kolczynski.

The principle in Schtraks relying on Castioni was confirmed in R v. Governor of Pentonville Prison ex parte Tzu Tsai Cheng, [1973] 1 All.E.R. 935. As James LJ, delivering the judgement said, ' but for my part I find the greatest help and guidance from the following words of Lord Radcliffe ...;' thus quoting the decision given by Lord Radcliffe in Schtraks. Id., at p. 938.

54.62 F. 972 (N.D. Cal. 1894); See also, Luis Oteiga y cortes v. Jacobus, (1890) 136 U.S. 330:

55.Re Ezeta, 62 F. 972 (N.D. Cal. 1894), at 1002.

Similarly, the United States Supreme court in Ornelas v. Ruiz, (1896), refused to accept the act of bandits as political as it did not fulfil the requirements enunciated in Castioni, and granted the extradition request of the Mexican authorities. In 161 U.S. 502, at p. 689:

56.Re Ezeta, Id., at pp. 1004-1005.

57.217 F.Supp. 717.

58.Id., at p. 720.

59.The court in this case applied the principles enunciated in castioni and Kolczynski to reach its conclusion. Id., at p. 722.

60.See, Escobedo v. United States, 623 F.2d. 1098, at p. 1104 (5th Cir. 1980), cert. denied; Sindona v. Grant, 619 F.2d. 167, at p. 173 (2d. Cir. 1980), cert. denied; Ramos v. Diaz, 179 F.Supp. 459, at p. 463 (S.D. Fla. 1959):

61.Eain v. Wilkes, 641 F.2d. 504 (7th Cir. 1981); United States v. Mackin, 668 F.2d. 122 (2d. Cir. 1981); Quinn v. Robinson, 783 F.2d. 776 (9th Cir. 1986):

62.Eain v. Wilkes, Id.

63.Id., at pp. 520, 521 & 523.

64.However, see In Re Doherty, (1984) 599 F.Supp. 270; Also discussed in infra n, 89. Discussed at pp. 134-135 of the Thesis.

65.It should be noted that organized form of aggression was interpreted in line with the principles enunciated in Castioni, however the principles enunciated in Castioni do not state anything with regard to the political or the social structure of the state. The requirements as stated in Castioni are, there should be a political uprising or a dispute between two parties in the state, and it must be shown that the act is done in furtherance, with intention of assistance in the course of acting in political matter.

66.The test adopted by the Anglo-American approach however, does not take motivation of the actor in consideration and it is not the determinative factor of the political character of any given act in extradition hearings. See also, Infra n, 81.

67.The acts of terrorism are directed more towards the civilian population rather than being based on rival organised political parties and overthrowing of a government. Moreover, the authorities in this area do not share a collective view about the term " terrorism"; See Supra n, 11.

68.Eain, Supra n, 61; See also, S. Lubet and M. Czackes, The Role of the American Judiciary in the Extradition of Political Terrorists, in 71 The Journal of Criminal Law and Criminology 193, at p. 193.

69.This resolution was adopted on December 16, 1981, by a vote of 75-21-43, General Assembly Resolution, A/RES/36/171 of 12 February 1982; See also 21 I.L.M. (1982) 442:

70.668 F.2d. 122 (2d.Cir. 1981).

71.Id., at p. 124.

72.Id., at p. 125.

73.Id., at pp. 128 & 137.

74.783 F.2d. 776 (9th Cir. 1986).

75.Id., at pp. 783 & 785.

76.Although, involvement of violence in most of the political uprising can not be denied however, Castioni, does not require that the uprising should necessarily be a violent one; See [1891] 1 Q.B. 149, at pp. 164-165.[Emphasis added].

77.Here again the magistrate argued the requirement of the target involved, about which Castioni does not state anything.

78.Supra n, 74 at 785 & 786.

79.Id., at pp. 785-786.

80.Id., at p. 817.

81.The Anglo-American system has adopted the definition enunciated in Castioni which requires nothing as far as the nature of the group involved in the conflict or the motivations of the accused is concerned.[Emphasis added].

82.Regarding the citizenship of the accused involved in the incident, *Castioni* does not state anything. Thus the judges in this case are extending the requirements as enunciated in *Castioni*. See also, opinion of judge Fletcher, *infra* pp.133-34 [Emphasis added].

83.*Id*., at pp. 817-818.

84.*Id*.

85.*Id*., at p. 818.

86.*Id*., at p. 820.

87.*Id*.

88.*Id*.

89.(1988) 599 F.Supp. 270, at p. 277.

90.17 C.C.C. (1910) 268.

91.*Id*., at p. 269.

92.*Id*., at pp. 270-271.

93.*Re Fedorenko (No.2)*, 17 C.C.C. 271, at p. 278.

94.*Schtraks* v. *Government of Israel*, [1964] A.C. 556 (H.L.( )); See also *Supra* n, 25:

95.30 D.L.R. (3d.) 1973, 260

96.*Id*., at p. 261.

97.*Id*., at pp. 268-269.

98.32 D.L.R. (3d.) (1973) 265. The ' *Armstrong Case* indicates that in Canada today, those seeking to fall within the exemption accorded political offenders will have to meet the following requirements.'

> " First the accused must act for a political purpose and in opposition to the existing government. This requirement is critically important, and the failure of the accused to testify on this point may be fatal to the defence. Second, the object of the attack or the nature of the rights affected are almost usually significant in establishing the political character of the offense. Third, the person acting must be a member of some movement or political group in which

> the majority of persons participating have adopted extra legal means to realize their objectives... Fourth, the central government of the requesting state must have some reason for requesting the surrender of the accused other than the enforcement of the criminal law in its ordinary aspect."

In J.G. Castel and Maelys Edwardh, Political Offences; Extradition and Deportation - Recent Canadian Developments, 13 Osgoode Hall Law Journal (1975), at p. 112.

Taking into consideration the decisions given in Hernandez and Re Wisconsin, La Forest comments that,

> " These two decisions combined appear to suggest that, at least in most cases, for an offence to be considered as political by a Canadian court, the act must be for a political purpose which is in direct opposition to the government of the country; the object of the act must be directly proximate to that government; the person acting must prove that he is a member of some political group or organization and that it is the policy of such a movement to use such measures; and the government of the state must be seeking the return of the offender for some other reason than the enforcement of the criminal law in its ordinary aspect."

G.V. La Forest, Extradition To and From Canada, (1977), at pp. 74-75.

99.32 D.L.R. Id., at p. 283;

La Forest speaking on the role of extradition judges on the determination of a political character of an act states that,

> " Until recently, it had been generally assumed that both the extradition judge and the judges on habeas corpus also had jurisdiction in the matter, but the Federal Court of Appeal has now held that it or extradition judges have no such jurisdiction, and it is not entirely clear that judges on habeas corpus have such jurisdiction either."

G.V. La Forest, Id., at p. 65.

100.32 D.L.R. Id., at p. 284.

101.For example, section 22. of the Extradition Act provides,
"Where the Minister of Justice at any times determines

> a) that the offence in respect of which proceedings are being taken under this Part is one of political character,
>
> b) that the proceedings are in fact, being taken with a view to try or punish the fugitive for an offence of a political character, or

c) that the foreign state does not intend to make a requisition for surrender,

he may refuse to make an order for surrender, and may, by order under his hand and seal, cancel any order made by him, or any warrant issued by a judge under this Part, and order the fugitive to be discharged out of custody on any committal made under this Part; and the fugitive shall be discharged accordingly."
R.S.C. 1970, c.E-21.

102.Cited in E. Mc Dowell, Digest of United States Practice in International Law, (1975), at p. 168.

103.74 I.L.R. 453.

104.Supra n, 102 at p. 169.

105.Id., at pp. 171-172.

106.Supra n, 103.

107.Id.

108.Id., at pp. 453-454.

109.Thomas E. Carbonneau, Supra n, 42 at p. 286; See also, L.C. Green, Terrorism And The Courts, in 11 Manitoba Law Journal, No.4 (1981), at 344 ; Rapoport, Between Minimal Courage and Maximum Cowardice; A Legal Analysis of the Release of Abu Daoud, 3 Brooklyn Journal of International Law, (1977), 195.

110.William M. Hannay, Political Offense Exception to Extradition, in 18 Columbia Journal of Transnational Law, (1979 -1980), at p. 406.

111.Cited in Thomas E. Carbonneau, The Political Offense Exception as Applied in French Cases Dealing with the Extradition of Terrorists, in 1983 Michigan Yearbook of International Legal Studies, 209 at p. 217; See also, William M. Hannay, Id.; and Thomas E. Carbonneau, Supra n, 42 at p. 287.

112.Thomas E. Carbonneau, 1983 Michigan Yearbook of International Legal Studies, Id., at p. 217.

113.Thomas E. Carbonneau, Supra n, 42 at p. 287.

114.Id., at pp. 287-288; Following the decision of cour d' appel, Croissant lodged an action with the Conseil d' etat, however the decision of the court to extradite Croissant was upheld by the Conseil d' etat.

115.Cited in William M. Hannay, Supra n, 110.at pp. 406-410.

116.For the text of the Treaty, see 141 C.T.S. 149.

117.Supra n, 110 at pp. 409-410.

118.Id., at p. 410.

119.27 I.L.M. (1988) 422.

120.28 U.S.T.-T.I.A.S. 8468, at 1104.

121.15 I.L.M. 1272. [Hereinafter cited as the European Convention on Terrorism].

122.Id.

123.However, like all treaties they are limited to the state parties to the treaty

124.Art.6(b) of the Harvard Draft, 29 Am.J. Int'l.L., (Supplement), (1935), at p. 22. However, this provision has been excluded by the Restatement of The Law Third, The Restatement of the Law, The Foreign Relations Law of The United States, Vol.I, (1987) [Hereinafter cited as the Restatement], see Sec. 476 at p. 566.

125.William Winthrop, Military Law and Precedents, (1920), at 17.

126.Supra n, 2 at p. 196.

127.24 I.L.M. (1985) 1527.

128.359 U.N.T.S. 273. [Hereinafter referred to as the European Convention].

129.316 U.N.T.S. 97, at p. 128.

130.Supra n, 1 at p. 433.

131.Benelux Publication, 22 (1960-2), cited in I.A. Shearer, Extradition in International Law, (1971), at p. 53. [Hereinafter cited as the Convention on Judicial Assistance].

132.87 L.N.T.S. (1929) 415.

133.34 I.L.R. 143.

134.Id., at p. 145.

135.However, this would be subject to possibility that courts will hold the ordinary rules and practice regarding extradition as the process continue.

136.Harvard Draft, 29 Am.J.Int'l.L., (Supplement), (1935), at p. 229.

137.St. Aubin and Billiot, cited in Harvard Draft, id., at p. 229.

138.Supra n, 1 at p. 433.

139.133 L.N.T.S. 321.

140.377 U.N.T.S. 305, at 311 and 313.

141.159 L.N.T.S. 329; See also, Extradition Treaties between Czechoslovakia and Greece Art 3(d) in 88 L.N.T.S. 219; Yugoslavia and Greece (1959) Art.51, in 368 U.N.T.S. 81:

142.The Gazette of India, Extraordinary, Registered No. D.221.

143.15 U.S.T.-T.I.A.S. 5691; Similar provision is inserted in the Extradition Treaty between United States and Sweden (1961) in Art. 2(21), 14 U.S.T.-T.I.A.S. 5496; See also, Extradition Treaties between Israel-Austria (1961) Art. 7, 448 U.N.T.S. 161; Israel-Italy (1956) Art. 6, 316 U.N.T.S. 97; Israel-United States, Art.2(28), 448 U.N.T.S. 283:

144.27 I.L.M. (1988) 422.

145.359 U.N.T.S. 273.

146.For example, see Chapter I at pp. 11 & 19.

147.28 U.S.T.-T.I.A.S. 8468.

148.C.T.S. (1976) No.3.

149.20 I.L.M. (1981) 723, at p. 724.

150.359 U.N.T.S. 273.

151.43 Stat. 1698.

152.See also, the Treaty (with Final Protocol) concerning legal assistance in civil, family and criminal cases (1957) between Hungary and German Democratic Republic, which states in Art. 64(3) that " Neither Contracting Party shall extradite to the other its own nationals."; For the text see Chapter II " Legal Assistance in Criminal Cases", in 408 U.N.T.S. 3 at p. 98; Whereas, the Extradition Treaty between Belgium and

Brazil (1953), in Art.1 states that, " If the person is a national of the State applied to, the said State shall not be obliged to surrender him." in 272 U.N.T.S. 157, at p. 172; And the *Treaty concerning the provision of legal assistance in civil, family and criminal cases*, between Union of Soviet Socialist Republics and Democratic People's Republic of Korea (1958), in Art.54 contains,

> " Extradition shall not take place if;
> (a) The person claimed is a citizen of the Contracting Party applied to; in 301 U.N.T.S. 301, at p. 390;

And the Convention between the Kingdom of Belgium and the Kingdom of Morocco *Concerning the Extradition and Judicial Assistance in Criminal Matters* (1959), in Art.4 states " The Contracting Party shall not extradite their own nationals ..." in 390 U.N.T.S. 275 at p. 285; See also, Art. 57(a) of the *Treaty concerning legal assistance in civil, family and criminal cases*, (1975) between Union of Soviet Socialist Republics and German Democratic Republic, in 305 U.N.T.S. 113; Art.2 of the *Extradition Convention* between Israel and Austria (1961) in 448 U.N.T.S. 161.

153.*Supra* n, 1 at p. 436.

154.22 U.S.T.-T.I.A.S. 7075.

155.In 316 U.N.T.S. 97, at p. 127.

156.However, the later treaty of 1956 between Israel and Italy is not relevant in the present context as the Israeli Law expressly refuses to extradite its own national, for e.g. see *infra* n, 161.

157.24 Stat. 1015.

158.31 Stat. 1818.

159.31 Stat. 1883.

160.14 U.S.T.-T.I.A.S. 5476.

161.Thedor Meron, Non Extradition of Israeli Nationals and Extraterritorial Jurisdiction; Reflections on Bill No.1306, in 13 *Is.L.R.* (1978), at p. 215.

162.In 272 U.N.T.S. 157, at p. 172.

163.In 301 U.N.T.S. 301, at p. 390; Provision to this effect is to be found in Art.2 of the *Convention on Extradition*, signed at Montevideo on Dec. 26, 1933, which states;

> " when the person whose extradition is sought is the citizen of the country to which the requisition is

> addressed, his delivery may or may not be made, as the legislation or the circumstances of the case may in the judgement of the surrendering state, determine. If the accused is not surrendered, the latter state is obliged to bring action against him for the crime with which he is accused ... The sentence pronounced shall be communicated to the demanding state."

See, 29 Am.J.Int'l.L. (Supplement), (1935) at p. 289.

See also, Art.59 of the Treaty concerning legal assistance in civil, family and criminal cases (1958), between Romania and Hungary, in 416 U.N.T.S. 199, at p. 284; Art.2 of the Extradition Convention between Israel and Austria (1961) in 448 U.N.T.S. 161, at p. 184:

164.For the text see, 22 Am.J.Int'l.L., (Supplement), (1928), at p. 314; 86 L.N.T.S. 120:

165.24 I.L.R. 492.

166.Id., at pp. 492-493.

167.20 Am.J.Int'l.L., (Supplement), (1926), at p. 244.

168.23 I.L.R. 404.

169.Constitution of the Federal Republic of Germany, in Peaslee, III Constitutions of Nations, (1965), at p. 361; The Extradition Act of the Netherlands provides in Art.4 that, "Netherlands nationals may not be extradited," Stb. 1967 No.139 - cited in the Netherlands Yearbook of International Law (1972) at p. 279; See also the Israeli Bill No.1306, Supra n, 161.

170.28 I.L.R. 319, at p. 320; However, see the practice of the United Kingdom, Chapter I at p. 11.

171.For example, see the Extradition Treaty between Italy and the United States (1983), 24 I.L.M. 1527; The Protocol concluded between Canada and the United States (1988), 27 I.L.M. 422; The Supplementary Treaty concluded between United Kingdom and the United States, 24 I.L.M. 1105; European Convention on Terrorism (1976), 15 I.L.M. 1272; These treaties expressly provide that a wide range of violent offenses will not be considered "political", moreover extraditibility is based on the sentence (imprisonment) to be imposed under the laws of both Parties for example, detention for more than one year; See, the discussion Supra pp. 143-44:

172.Prof.Bassiouni states that,

> " A trial in absentia is valid in the state where that conviction was rendered and a defense to extradition in such a case would depend solely on the public policy of the requested ... But there is no recognised exemption by customary international law for trials in absentia."

Supra n, 1 at pp. 443 & 446.

173.For example, see Art.1 of the Extradition Treaty between Canada and the United States, (1976) which provides, " Each Party agrees to extradite to the other ..., persons found in its territory who have been charged with, or convicted of, any of the offenses ...." in C.T.S. (1976) No.3; See also Art.1 of the Extradition Treaty between the United Kingdom and the United States, (1972), in 28 U.S.T.-T.I.A.S. 8468:

174.R.S.C., c.E.-21 (1970).

175.[1960] 2 All.E.R. 178 (Q.B.D.). The English court in this case was interpreting the provision of the English Extradition Act of 1870, which is similar to the provision contained in the Canadian Extradition Act of 1970. See infra n, 176.

176.ex parte Caborn-Waterfield, Id., at pp. 179-180.

177.The Extradition Act of 1870, in section 26 contains the following provision;

> " The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy:"

See 33&34 Vict. c.52 at pp. 295-296.

178.ex parte Caborn-Waterfield, Supra n, 175 at pp. 180-181.

179.Id., at pp. 181-182.

180.[1983] 1 A.C. 46.

181.G.V. La Forest, Supra n, 98 at p. 112; For example, see also R. v. Brixton Prison Governor, ex p. Kotronis, [1969] 3 All.E.R. 304 (Q.B.D.):

182.La Forest, supra n, 98 at p. 110, see also the cases cited therein.

183.G.V. La Forest, supra n, 98 at p. 112.

184.176 F.Supp. 877, at pp. 878-879.

185.*Id.*, at p. 879.

186.*Id.*, at pp. 339-340; Similarly, in *Gallina* v. *Fraser* (1959), where, ' the Republic of Italy requested the extradition of Gallina, a citizen of United States by birth and domiciled in Sicily for participation in armed robberies. Gallina eluded capture and entered the United States in 1955. in two trials in May 1949 and May 1951, Gallina was convicted in absentia in Italy and sentenced to terms of imprisonment and to pay fines.'
The United States District court of Connecticut, on may 15, 1959, said

> " ... we hold that extradition of a person convicted in contumacium is not contrary to due process of law even where it appears that the extradition will not be followed by a new trial, but rather by immediate incarceration for the offense charged upon a sentence previously imposed, so long as there is sufficient evidence of criminality to justify extradition in the first place under the statutory and treaty provisions regulating same."

In *Gallina*, the court expressly said that it was outside its competence to consider procedure in the requesting state and it was for the executive to decide whether to request a new trial in Italy or any other condition. 177 F.Supp. 856, at pp. 858-59 & 866.

187.See, *Ex parte La Mantia*, (1913) 206 F. 330.

188.*Supra* n, 1 at pp. 446.

189.187 F.Supp. 710

190.*Supra* n, 175.

191.*Supra* n, 180.

192.*Supra* n, 2 at p. 165.

193.*Id.*, at p. 166.

194.*Id.*

195.Art. 4, in 29 *Am.J.Int'l.L.*, (supplement), (1935), at p. 99.

196.See comment on Art.4 of the *Harvard Draft* and the list of treaties therein, *Id.*, at p. 103. See also, Art. 58(c) of the *Treaty concerning legal assistance in civil, family and* criminal cases, (1958) concluded between Romania and Hungary in 416 U.N.T.S. 199, at p. 284; Art. 54(c) of the Treaty concerning legal assistance in civil, family and criminal cases, (1957), concluded between U.S.S.R. and Democratic People's Republic of Korea in 301 U.N.T.S. 301, at p. 390; Art. 57(c) of the Treaty concerning the legal assistance in civil, family and criminal cases, (1957) concluded between U.S.S.R. and G.D.R. (1957), in 305 U.N.T.S. 113, at p. 198; Art. 65(1)(a) of the Treaty (with Final Protocol) concerning legal assistance in civil, family and criminal cases (1957) in 408 U.N.T.S. 3, at p. 100; Art.III (b) of the Extradition Treaty between Belgium and Brazil, in 272 U.N.T.S. 157, at p. 174:

197.Harvard Draft, Id., at pp. 99-100.

198.Id., at p. 100.

199.Restatement, Supra n, 124 at p. 566.

200.Restatement, see Reporters Note 3, Id., at pp. 573-574.

201.C.T.S. (1976) No.3.

202.See, La Forest, Supra n 98, at p. 81.

203.24 I.L.M. (1985) 1527. Similarly, offenses in the United Kingdom are rarely subject to limitation provisions.

204.359 U.N.T.S. 273.

205.For the list of treaties see the Harvard Draft, supra n, 17 at pp. 102-103.

206.Restatement, Supra n, 124, see comments at p. 570.

207.Apart from the list of treaties in the Harvard Draft, Supra n, 17 at p. 103; see also, Art.8(1) of the Convention concerning extradition and judicial assistance in criminal matters, (1959), concluded between Belgium and Morocco, in 390 U.N.T.S. 275, at p. 287; Art.8(3) of the Extradition Convention between Israel and Austria, (1961), in 448 U.N.T.S. 159, at p. 185; Convention concerning extradition and judicial assistance in criminal matters, (1956), in 316 U.N.T.S. 97, at p. 128:

208.19 I.L.R. 378.

209.Art.III of the Extradition Treaty between Spain and Venezuela of Jan. 22, 1894 provides that,

" Extradition will not be allowed -

> (b) On expiration of the time prescribed, according to the laws of the country to which requisition is made, for the institution of criminal proceedings, or for the punishment of the crime on which the demand is founded."

For the text of the treaty, see 179 C.T.S. 409, at p. 411.

210.43 *I.L.R*. 243.

211.*Id*., at p. 244.

212.34 *I.L.R*. 134, at p. 137.

213.For the text of the Treaty, see 137 C.T.S. 413, at pp. 415-416.

214.74 *I.L.R*. 449, at p. 450.

215.For the definition of International Crimes, see United Nations International Law Commission, Report on Draft Articles Adopted at the Twenty Ninth Session, in 16 *I.L.M*., (1977) 1251.

216.*Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, General Assembly Resolution 291 (1968), in (1968) *U.N.Ybk.* at pp. 609-611. [Hereinafter referred to as *Convention on Statutory Limitations*]. This Convention was approved by 58 votes to 12, with 17 abstentions.

217.*Id*.

218.For the definition of war crimes, see Charter of the International Military Tribunal, in 82 U.N.T.S. 279 at pp. 286-88:

219.*Id*.

220.For example see, *Supra* n, 13.

221.The term "Amnesty" has been defined by the *Black's Law Dictionary* as,

> "a sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict ..."

and the term "Pardon" as defined by the same is

> "an act of grace, proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from

> the punishment the law inflicts for a crime he has committed. An act of grace from governing power which mitigates the punishment the law demands for the offense and restores the right and privileges forfeited on account of the offense.

By Henry C. Black, Abridged Fifth Edition (1983).

222.Supra n, 1 at p. 450.

223.Id., at pp. 450-451.

224.Id.

225.Supra n, 2 at p. 201.

226.See at p. 176.

227.Supra n, 2 at p. 201.

228.Although the case of Mahmoud is that of deportation, however the term pardon is of central importance in this hearing. Moreover, problem of this kind may arise in an extradition case.

229.The Edmonton Sun, Thursday, August 11, 1988.

230.Id.

231.Peaslee, III Constitutions of Nations, (1965), at p. 410.
Art. 39 has however been abrogated by the Constitution of Greece of 1975, see VI Constitutions of the Countries of the World (ed. A.P. Blaustein & G.H. Flanz 1988), Oceana Publications, Inc. New York.

232.Monarchy was abolished on June 1, 1973, A.P. Blaustein & G.H. Flanz, Id. Nevertheless, in the case of Mahmoud (1971) Monarchial system was still prevalent in Greece and Art.39 had not been abrogated.

233.The Edmonton Journal, Friday, Dec. 16, 1988. Thus, Mahmoud can be deported however, his claim for refugee status is yet to be settled.
One of the arguments forwarded by Mahmoud's counsel was, 'Mahmoud's act was a military operation'; Id. This argument is not reasonable in view of the facts of the case presented before the court, as an attack conducted in a neutral territory can hardly be recognised as a military operation. Moreover, the author is of the opinion that this kind of argument in a deportation hearing hardly makes sense. The only central issue being whether the Pardon granted in Greece does or does not obliterate the convict of the criminality.

234.For example, one may claim jurisdiction on the basis of ' passive personality', another may claim jurisdiction on the basis of ' territorial principle'; yet another may claim jurisdiction on the basis of ' protective principle.

235.For example in this case the accused being present in Canada.

236.Supra n, 1 at p. 453; For further discussion see under the title " Ne Bis in idem", at p. 177-85.

237.G.V.La Forest, Supra n, 98 at p. 82.

238.Comment on the Harvard Draft, Supra n, 17 at p. 145.

239.The Restatement in sec. 476(1)(b) provides,

> " Under most international agreements, state laws and practice;
> (1) A person sought for prosecution or for enforcement of a sentence will not be extradited
> (b) if prosecution in the requested state would be or was, in contravention of an applicable principle of double jeopardy;

Supra n, 124 at p. 566.

240.Restatement, Id., at p. 556. The Restatement further adds in its comment that,

> " The principle that a person should not be subject to double jeopardy is common to legal systems generally, and in many countries is constitutionally mandated. Under most treaties, the requested state does not extradite a person if he has already been prosecuted in that state for the acts on the basis of which extradition is sought, whether that prosecution resulted in conviction or acquittal. Some laws and treaties also preclude extradition if the person sought has previously been prosecuted for the same offense in the requesting state; some state preclude extradition if the person sought has been prosecuted in the third state."

See Comment (c) at p. 568, Id.

241.24 I.L.M. (1985) 1527.

242.C.T.S. (1976) No.3.

243.Art.3(a), 272 U.N.T.S. 157.

244.Art.4, 328 U.N.T.S. 173.

245.Art.7(2), 316 U.N.T.S. 97.

246.Art.61(c), 468 U.N.T.S. 3; See also, Art.7(2) of the Convention between Italy and the State of Israel Concerning Extradition and Judicial Assistance in Criminal Matters (1956), in 316 U.N.T.S. 97, at p. 128; Art.III(a) of the Extradition Treaty between Belgium and Brazil (1953), in 272 U.N.T.S. 157, at p. 174; Art. 65(1)(b) of the Treaty (with Final Protocol) concerning legal assistance in civil, family and criminal cases (1957), between Hungary and German Democratic Republic, in 408 U.N.T.S. 3, at p. 100; Art.7 of the Convention concerning extradition and judicial assistance in criminal matters (with Additional Protocol) (1959), between Belgium and Morocco, in 390 U.N.T.S. 275, at p. 287; Art.54(e) of the Treaty concerning the provision of legal assistance in civil, family and criminal cases (1957), between U.S.S.R. and Democratic People's Republic of Korea, in 301 U.N.T.S. 301, at p. 390; Art.58(d) of the Treaty concerning legal assistance in civil, family and criminal cases (1958), between Romania and Hungary, in 416 U.N.T.S. 199, at p. 284; Art.57(d) of the Treaty concerning in legal assistance in civil, family and criminal cases (1957), between U.S.S.R. and German Democratic Republic, in 305 U.N.T.S. 113, at p. 198:

247.448 U.N.T.S. at p. 161.

248.28 U.S.T.-T.I.A.S. 8468.

249.C.T.S.(1969) No. 25.

250.Schmidt v. The Queen et. al, [1987] 39 D.L.R. (4th.) 18, at p. 30.

251.Supra n, 1 at pp. 452-453.

252.Denial or acquiesence to the request for an extradition being subject to the classifications mentioned earlier.

253.39 D.L.R. (4th) at p. 30.

254.Constitution Act, 1982, Schedule B of the Canada Act, stats. U.K. 1982, C.11.

255. Supra n, 253.

256.The phrase principles of "fundamental Justice" received a wide interpretation in Re B.C. Motor Vehicle Act [1985]. It was said in the judgement that

> "The phrase principles of fundamental justice is not a protected right but a qualifier to the protected right not to be deprived of 'life, liberty and security of the person"; its function is to set the parameter of that right. Interpretation of the term

> must be with reference to the protected rights but not so as to frustrate or stultify them."

Per Dickinson C.J. and Beetz, Chouinard, Lamer, and Le Dain JJ., 2 S.C.R. 486, at p. 487.

257.Supra n, 1 at pp. 453-454.

258.75 I.L.R. 106.

259.Id.; This judgement by the Swiss court is in line with the decision handed by the P.C.I.J. in S.S. Lotus (1927), in which, France challenged the jurisdiction exercised by the Turkish courts against the French officer following a collision on the High Seas between the Turkish steamer Boz-Kourt and the French steamer Lotus. One of the questions the court had to consider in this case was whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of the French officer. The court said;

> " International law governs relations between independent States. The rule of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

It may be argued therefore, that unless and until states have agreed to the contrary, there is no such rule in international law which would exclude concurrent jurisdiction exercised by states; See, The case of the S.S. "Lotus", (1927), in P.C.I.J., series A.-No.10, Part 2, 1 at p. 18:

260.Art.4(1), C.T.S.(1976) No.3.

261.24 I.L.M. 1527.

262.Id.

263.359 U.N.T.S. 273.

264.For the facts of the incident, see The Times (London) 9-22 Oct. 1985; See also Jordan J. Paust, Extradition and United States Prosecution of the Achille Lauro Hostage Takers: Navigating the Hazards, in 20 Vanderbilt Journal of Transnational Law (1987) 235:

265.See, Documents Concerning The Achille Lauro Affair and Cooperation in Combatting International Terrorism, 24 (1985) I.L.M. 1509;

The hijackers were found guilty by the Italian Court of "carrying out a kidnap with terrorist intent, leading to the death of a hostage" and sentenced three of them to terms of imprisonment ranging from 15 to 30 years, and three others to between six months and 71/2 years. Jerusalem Post, 11 July, 1986;

See also, The Times (London) 11 July, 1986.

266.The District Court in Washington D.C. issued an arrest warrant for Mr. Abul el-Abas, Abdel Atef Ibrahim Fatayer, Hallah Abdalla Al-Asan, Maged Al Malaki, and Hammad Al Abdulla; See 24 I.L.M. (1985) at p. 1554:

And it was announced by the United State that it reserved the right to seek extradition "once all Italian legal proceedings, including appeals, are ended." See, New York Times, July 11, 1986.

267.For detail see the Harvard Draft, Supra n, 17 at p. 289.

268.See for example, Art.7 of the Canada-United States Extradition Treaty of 1971, in C.T.S. (1976) No.3; Art.6 of the Extradition Treaty between United States and the United Kingdom (1972), in 28 U.S.T.-T.I.A.S. 8468:

269.359 U.N.T.S. 273; This provision of the European Convention is practically meaningless as most of the European States Parties to the Convention have abolished capital punishment from their legislations except England, where the provision of capital punishment is still maintained in cases of treason and desertion in face of enemy.

270.C.T.S. (1976) No.3. However, this provision was inserted to satisfy the Canadian practice, as Canada has abolished the death penalty, whereas some of the states in the United States still have the provision for capital punishment. And, in Canada the final decision regarding this provision is made by the Minister of Justice and not the Courts; For example see the case of Joseph Kindler discussed at pp. 188-91; See also, the case of Charles Ng at pp. 191-192:

271.24 I.L.M. 1527.

272.See Art.7, 14 U.S.T.(2)-T.I.A.S. 5476, 1707.

273.See Art.IV, 28 U.S.T.-T.I.A.S. 8468.

274.Id.

275.As desertion is considered to be a military offence thus non extraditable (See Chapter IV, at p. 144) whereas treason is deemed to be a political offence (see Chapter IV, at pp. 116-117).

276.23 I.L.R. 412.

277.Id., at pp. 413-414.

278.74 I.L.R. at p. 456; See also Ktir v. Ministère Public Fédéral, (1961), 34 I.L.R. 143;

279.For the text of the treaty see 182 C.T.S. (1895) 232.

280.For the text of the Convention, see 359 U.N.T.S. 273.

281.Memorandum of Fact and Law of the Attorney General of Canada. Court No.A 81-87.

282.Id.

283.S.C.,c.1.

284.Section 7 of the Charter proclaims that;

> " Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

See, the Constitution Act, 1982, Schedule B of the Canada Act, stats. U.K. 1982, C.11.

285.Sec. 12 provides, " Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Id.

286.Memorandum of Fact and Law of the Attorney General of Canada. Court No. A 81-87, at 21.

287.R. v. Jones, [1986] 2 S.C.R. 284, per Wilson, J., at p. 314.

> In Section (1) " The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Thus the rights and freedoms is not absolute. Accordingly, they impose limitations to the guarantees found therein. Section 1 permits "reasonable limits" to the Charter protected freedoms where the limit is "prescribed by law as can be demonstrably justified in a free and democratic society. See, Magnet, II Constitutional Law of Canada, (1985), at pp. 861-863.

288.Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer, J., at p. 501.

289.For the text, see U.N.Ybk. (1966), at p. 423. [Hereinafter referred to as the "Covenant"].

290.Int'l Fund For Animal v. The Queen, (1988), 83 N.R. 303 (F.C.A.), per Mac Guigan, J., at p. 312, quoting Dickinson C.J.C. (dissenting) in Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at p. 349.

291.Schmidt v. The Queen et. al, [1987] 39 D.L.R. (4th.) 18.

292.1983 5 E.H.R.R. 611.

293.1950 Eur.T.S. No.5; Council Eur.Doc.H (79) 4 (1979)

294.(1984) 6 E.H.R.R. 373, at 383.

295.See the provisions of section 7, the Constitution Act, 1982, Schedule B of the Canada Act, stats, U.K. 1982, C. 11.

296.After the committal Kindler once again escaped from Montreal detention centre however, was captured by the Canadian authorities and is awaiting extradition to the United States. See The Globe and Mail, Wednesday, Nov. 30, 1988.

297.Charles Ng has been charged of mass murder in California and is likely be sentenced to death upon his return; See, Maclean's, Oct. 31, 1988;

See also, Re Extradition Act and in Re Peltier (1976). In this case, Peltier was extradited where he could under the law of South Dakota be subject to death penalty. Submissions were made to the Minister of Justice who, following a hearing to determine whether the offenses were of a political character, ordered the extradition; Cited in La Forest, supra n, 98 at pp. 23-24:

298.The Globe and Mail, Wednesday, Nov. 30, 1988.

299.The purpose of the preliminary hearing or otherwise also known as the judicial hearing " (barring minimal statutory and treaty exceptions) is merely to determine whether the relevant falls within the appropriate treaty and whether the evidence presented is sufficient to justify the executive surrendering the fugitive to the requesting country for trial there."; See, Schmidt v. R, [1987] 1 S.C.R. 500; Argentina v. Mellino,

[1987] 1 S.C.R. 536; U.S.A. v. Allard and Charette, [1987] 1 S.C.R. 564:

CONCLUSION

Extradition a two - stage Process;

Extradition today in the absence of internationally accepted doctrines of criminal justice;

> " has assumed a new role and function, whereas until recently, it was mainly if not exclusively a bi-lateral instrument, used in the interests of two states concerned--- requesting and requested--- it has, in the past few decades, assumed a broader function which supersedes those bi-lateral interests."[1]

The ever growing number of extradition treaties concluded between States is a clear indication of its role in the suppression of crimes. While the subsequent amendment of the extradition treaty recently made by States[2] reflect the growing concern by those States towards act(s) of international terrorism.

Extradition, as has been submitted is;

> " An institution of international public law which renders possible an international administration of justice. The judicial control on decision with respect to extradition has, in this context a purely domestic character and as such is not regulated by international law."[3]

Normally the surrender of a person is a discretion exercisable by the executive, although the practice may vary from State to State. In Canada for example, the function of the Minister of Justice involves the exercise of executive discretion, as

> " the minister can accept the extradition order made by the court, or he can refuse to follow it ...; the discretion is exercisable by the executive only and is not a question cognizable by the courts."[4]

Thus, it may be argued that extradition is essentially a 'two -stage process involving a judicial determination followed by the exercise of executive discretion.'[5] The purpose of the judicial hearing,

> " (barring minimal statutory and treaty exceptions) is merely to determine whether the relevant crime falls within the appropriate treaty and whether the evidence presented is sufficient to justify the executive surrendering the fugitive to the requesting country for trial there."[6]

The technical aspects of extradition procedure on the other hand, are not stated in the treaty but are in fact governed by the extradition legislation of the States concerned.[7] And it is in accordance with the domestic legislation that a State decides whether to extradite a person or not.[8]

The General Terms of Extradition and the Exercise of Criminal Jurisdiction;

The general terms of extradition are governed by either Treaty, National Laws or Reciprocity.[9] However, States under international law are under no legal obligation to surrender a fugitive from justice in the absence of a treaty.[10] Furthermore, in order to secure the return of an offender or a convict, States should have ' valid jurisdiction'[11] over the offense or, extradition is not granted. And, it is for the requested State to ascertain whether the requesting State does or does not possess such a jurisdiction.

In so far as the exercise of criminal jurisdiction by a State is concerned the principle of territoriality is regarded as the fundamental basis for jurisdiction in International law, as it is believed that;

> " a state is competent to deal with any offence committed within its territory, without regard to the nationality of the offender."[12]

However, as was observed in the second chapter the exercise of criminal jurisdiction by States is not limited to the principle of territoriality. The growing concern for acts of international terrorism have lead States to assert jurisdiction on different principles such as the protective, passive personality and universal jurisdiction.[13] The extradition treaties contain specific reference to such jurisdictions exercised by States.[14]

These provisions state that ' extradition is to be granted if the laws of the requested State provide jurisdiction over such an offense committed in similar circumstances.'[15] This would mean for example, if the requesting State is claiming jurisdiction on the basis of protective principle and the laws of the requested State recognizes the application of such a principle in similar circumstances, the request for extradition will be granted. The Protocol concluded between the United States and Canada however, gives a wide discretion to the executive authority of the requested State.[16] This provision was incorporated as an extra precautionary measure so that serious offenses viz., acts of terrorism may not go unpunished for the very simple reason that the laws of the requested State did not provide jurisdiction in similar circumstances.

From the observations made in the second Chapter it may be argued that States are overly expanding their criminal jurisdictions.

Substantive Requirements;

Apart from the jurisdictional issue there are certain 'substantive requirements,' that are to be met before an extradition request is allowed. For example, an offense for which a person is sought should be;

(i) an extraditable offense, or in other words, the act must be one of the offenses for which extradition is permitted;[17]

(ii) the act charged must constitute an offense in the legal system of both the requesting and the requested state (double criminality[18]); and

(iii) after the extradition request is granted, the requesting State is under an obligation not to try the person surrendered for an offense other than the one for which the surrender was made (Rule of Speciality[19]).

It is submitted that the requirement of double criminality, an important provision of the law of extradition should be applied with utmost care so that serious offenses do not go unpunished merely because the offenses were not identical in the legal systems of the States concerned. Thus, treaties ought to be liberally interpreted[20] in order to achieve the purpose of extradition treaties.

The process for the requirement of extraditable offenses and double criminality can be made simpler through the application of eliminative method, as in accordance with this method an offense is extraditable if it is punishable in both States by a specific period of imprisonment as provided in the treaty in question. This would mean that an offense is extraditable only if it fulfils the requirement of extraditable offenses and double criminality.

Political Offence;

Normally, extradition is granted once the requirements as mentioned earlier are met however the request may still be denied on certain grounds.[21] A ground for such a denial is, one of the most complex issue of international extradition law i.e., the concept of political offense.[22] From the observation of the existing statutes and treaties on extradition, it may be argued that the political offense exception is a generally accepted principle.[23] The question as to whether an act does or does not constitute a political offense is determined by the State taking the decision in accordance with its domestic law and the practice followed by it.[24]

However, " unfortunately, the courts have not to date developed a uniform procedural approach to this determination."[25] States apply different tests[26] to determine the political nature of an act. However, problems seem to arise when consideration has to be made regarding the concept of 'relative political offense'. The issue becomes more complicated when controversy surrounds the question as to 'who is (i.e., whether the executive or the judiciary) to determine the political nature of the crime."[27] The practice in Canada as stated by Thurlow, J. in Re State of Wisconsin And Armstrong,[28] (1973), is;

> " ... that in Canada an extradition judge is not empowered by the Act to determine the question or to discharge a fugitive on the ground of the offence being of a political character..."

Although it may be said that ' the Executive being a political body is more likely to understand what is and is not political in character however, its decision is not made in open court.[29] The judges on the other hand must let justice in this sensitive area be seen to be done and in order to bring continuity into the system; persons in the Executive come from differing political platforms which it is impossible to assume will not cloud their judgement. So, it is a decision for the courts with discretion left in the Executive if it wishes to refuse to surrender on this ground if the courts have refused this argument.'[30]

The Emerging Trend;

Issues of a political nature whether determined by the courts or the executive arm of government, may hardly be of any significance in the near future. The ' recent emerging trends ' of States though at present limited only within a few countries may be cited as a significant achievement in the area of extradition law. These treaties[31] have enacted stringent provisions to deal with the problem of international terrorism[32] and the extradition of terrorists by specifying certain offenses, which are not to be considered ' political' thus making them extraditable. Apart from enumerating offenses which are not to be considered as offenses of a political character, these treaties define extraditable crimes on the basis of the sentence i.e., imprisonment to be imposed in both States, for example, ' by more than twelve months in both countries.'

Thus, the recent trend adopted by States have virtually limited the concept of ' relative political offense' from the realm of extradition law between these States, hence, confining the concept within the domain of ' purely political offenses.' In accordance with these treaties, a fugitive is less likely to be granted ' political asylum' if the offense for which he/she is charged or convicted falls within the category of crimes enumerated in the treaty or carries an imprisonment of twelve months or more.

The treaties concluded between these States are however like all treaties, limited to the State parties to it. Thus it is suggested that unless the world community responds to a modern multi-lateral Convention (though there is lack of solidarity on this issue) for the prosecution or surrender of an offender, it is doubtful whether the problem of terrorism will be brought under control.[33] The proposed Convention should like the recent treaties list offenses which are not to be considered political[34] and on the other hand, it should vest jurisdiction in State Parties to either try and punish or extradite the perpetrators of such offenses, or vest universal jurisdiction in States.

__Alternate Methods__;

In view of the uncertainty involved in cases where a person sought after may take the plea of political offence defence, States have often opted for more informal methods such as kidnapping, abduction[35] or deportation. The reason for deportation on the other hand, results from the overall political relations between the states concerned. Assuming for example that, in Soblen Case,[36] the outcome of deportation order had meant handing Soblen to the Soviet authorities or one of its allies, it is hard to believe that the English Courts would have arrived at the same conclusions as it did. However, in view of the nature of this study it is difficult to ascertain every political element that might affect the outcome of extradition. Thus, it is difficult to assert or to derive such conclusions from the decision of the courts as the " decisions are disguised by the ultimate legal characterization on which the decision is founded."[37]

In view of the growing concern for acts of terrorism it is further suggested the issue of non-extradition of nationals ought to be removed from future extradition treaties. Apart from the difficulty involved in justifying such non-extradition, it should not be applied if the matter in issue falls within the scope of terrorism, or else terrorists will always find asylum in their country of nationality.

NOTES;

1.C.V. Wijngaert, The Political Offence Exception To Extradition, (1980), at p. 20, see also the Conventions cited therein.

2.For example see, The Protocol Amending The Treaty On Extradition (1988), between Canada and the United States, 27 I.L.M. 422; Extradition Treaty Supplement Limiting the Scope of Political Offenses To Exclude Acts of Terrorism (1985) , between United Kingdom and the United States, 24 I.L.M. 1105; Extradition Treaty between Italy and the United States (1983), 24 I.L.M. 1527; and the European Convention on the Suppression of Terrorism, (1976), in 15 I.L.M. 1272:

3.Wijngaert, supra n, 1 at p. 38.

4.Re Federal Republic of Germany v. Rauca, [1983] 41 O.R. (2d.) 225 (Ont.C.A.), at p. 241.

5.Joseph John Kindler v. M. John Crosbie, Minister of Justice, Attorney General of Canada, Memorandum of Fact And Law of the Attorney General of Canada, Court No. A-81-87, at p. 9.

6.Argentina v. Mellino, [1987] 1 S.C.R. 536, at p. 553.

7.This tends to bring uniformity in the practice of the State concerned in view of diverse legal system followed by States.

8.The extradition procedure in Canada for example, is governed by the Canadian Extradition Act (1970), R.S.C., c.E-21; As for United Kingdom see, The Criminal Justice Act (1988); For United States, 18 U.S.C. section 3181-3195; For France see, The Extradition Act of 1975:

9.This of course depends upon the practice followed by the State concerned, see for example, chapter II at pp. 41-49.

10.However, traditional writers viz., Grotius, Vattel maintained that there exists in international law an obligation to surrender even in the absence of treaty obligations. See Chapter I, at pp. 3-5.

11.See Chapter 2 at pp. 48-50; See also, Limitations on Jurisdiction to Prescribe, Section 402, The Restatement of The Law Third, The American Law Institute, I The Foreign Relations Law of the United States, (1987) [hereinafter referred to as the Restatement], at pp. 244-245;

12.J.L. Brierly, The Law of the Nations, (1963) 6th.ed., at p. 299.

13.This for example is evident from the earlier views as expressed in the Harvard Draft on Extradition of 1935 [hereinafter referred to as the Harvard Draft] and the provision of the Restatement. For example, the Harvard Draft in its comment states that,

> "Jurisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence."

29 Am.J.Int'l.L., (Supplement), 1935, at p. 579; However, this principle though not included in the Harvard Draft has been included in the Restatement, see Section 402. See also Chapter II under the heading "Passive Personality" and "Protective Principle."

The importance of 'protected principle' on the other hand, may be illustrated from the 1972 amendment to the Israeli Penal Law, which gives a broad jurisdiction to the Israeli courts to try;

> "... offenses committed abroad...which would be an offense if it had been committed in Israel and which harmed or was intended to harm the state of Israel, its security, property or economy ..."

For the discussion on jurisdiction see Chapter II at pp.50-67:

The 1975 amendment to the French Penal Code provides

> "Every foreigner who outside the territory of the Republic renders himself guilty, either as perpetrator or as accomplice, of a felony or misdemeanour against the security of the state... or of a felony against French diplomatic or consular agents or offices may be prosecuted and tried according to the provisions of French law if he is arrested in France or if the Government abstains his extradition."

Law of July 11, 1975, Law No. 75-624, Arts. 10-14 [1975] J.O. 7220, Dalloz Sirey, Legislation [D.S.L.] 261 (France), cited in J.B. Gaynes, Bringing the Terrorist to Justice; A Domestic Law Approach, 11 Cornell International Law Journal 71, at p. 76.

14.For example, the Protocol (1988) between Canada and the United States provides in Art.III (2), that,

> " When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate

> authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances..."

27 I.L.M. 422, at p. 424;

The European Convention on the Suppression of Terrorism (1976), provides that,

> " This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Art.6(2), 15 I.L.M. 1272, at p. 1273; See also, Art.III of the Extradition Treaty between Italy and the United States (1983), 24 I.L.M. 1527, at p. 1528; Art.2(2) of the Organization of American States: Inter-American Convention on Extradition (1981), 20 I.L.M. 723, at p. 723:

15.See sec.III(a) of the Protocol, Supra n, 2.

16.See Art.III(2) of the Protocol, Id.

17.The enumerative method has made the application of this rule more simpler. As extraditibility of offenses are determined by the sentence to be imposed rather than enumerating a list of extraditable offenses.

18.The double criminality rule,

> " serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offenses not recognized as criminal by the requested state."

On the other hand, ' the requested state is not put in a difficult situation of extraditing a person who would not according to its own standards, be subject to punishment.' I.A. Shearer, Extradition in International Law, (1971) at pp. 137-138.

19.For detailed discussion on this topic see Chapter III, at pp. 93-103.

20.For example see, n. 17, at chapter III.

21.See for example, Chapter IV for the various grounds for " Denial of Extradition".

22.It should be noted that traditionally extradition was asked for political offenders, however the later practice indicate that political offenders are not to be extradited. The present acts of growing terrorism however, has the States thinking whether this practice ought to be changed. See for example, chapter 1, at p. 1 and Chapter IV, at pp. 115-119.

23.The term is not defined either in the statutes or the treaties. In fact, the international community has not been able to arrive at a universally acceptable definition. See Chapter 1, at p. 8.

24.See the cases discussed in Chapter IV, at pp. 120-144.

25.S. Lubet & M. Czackes, The Role of American Judiciary in the Extradition of Political Terrorists, 71 _Journal of Criminal Law and Criminology_, (1980), 193 at 206.

26.See Chapter IV at pp. 120-144.

27.See for example the case of _Eain_ v. _Wilkes_, (1981), 641 F.2d. 504, and the cases cited therein.

28.32 D.L.R. (3d.) 265, at p. 283.

29.V.E. Hartley Booth, I _British Extradition Law and Procedure_ 1980, at p. 253.

30._Id_.

31._Supra_ n. 2.

32.It should be understood that the present study is related to extradition and is not intended to deal with the subject of Terrorism. But there is no doubt that acts of terrorism do affect the subject of extradition.

33."For the problem is too complex and universal to be dealt with by any nation;" See the statement by the Under Secretary of State for Management Before the Senate Foreign Relations Committee (June 10,1981), cited in Geoffrey Levitt, International Counterterrorism Cooperation: The Summit Seven and Air Terrorism, 20 _Vanderbilt Journal of Transnational Law_ (1987), at p. 259.

However, the problem has been to tackle this issue on a global, comprehensive basis. See for example, the proposed Draft by the United States on "Convention for the Punishment of Certain Acts of International Terrorism" U.N.Doc.A/C.6/L.850(1972), and the outcome of the General Assembly Resolution 3034 (adopted by 76-35-17) G.A.Resl., 27 U.N. GAOR C.6, U.N. Doc. A/8969/L.696 (1972). United States who proposed the Draft voted against the Resolution 3034.

34.As the international community has not been able to adopt a universally acceptable definition of the term "terrorism". See n, 11 Chapter IV.

35.However, the domestic legislation of some States expressly deny jurisdiction to their courts if extradition was obtained through illegal means, for example see the French and German practice, n, 34 chapter II.

36.[1963] 2 Q.B. 243.

37.Supra n, 1 at p. 195.

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